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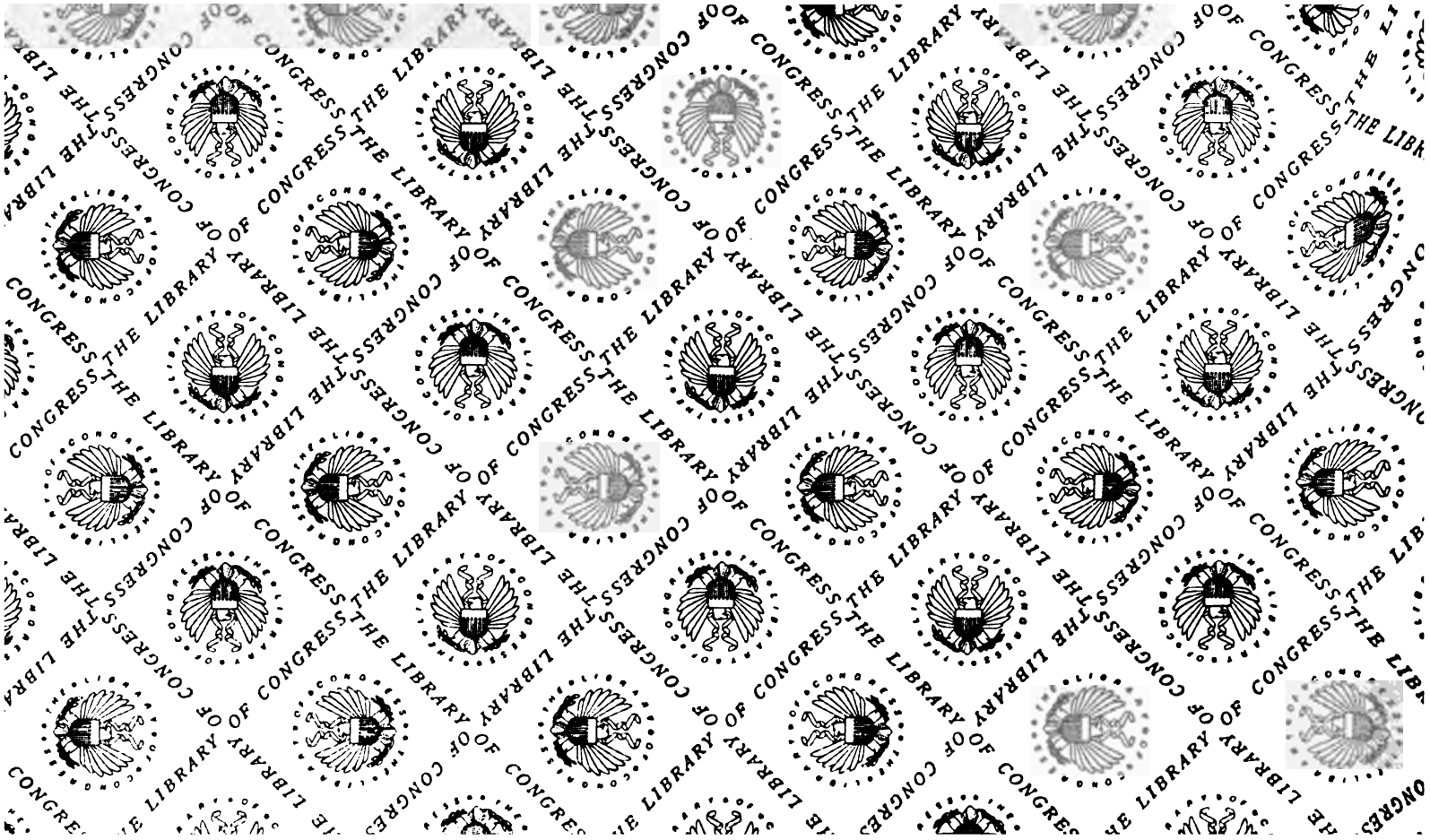
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GOVERNMENT AID THROUGH DISTRICT ORGANIZATIONS

HEARINGS

BEFORE

THE COMMITTEE ON IRRIGATION AND RECLAMATION OF ARID LANDS UNITED STATES SENATE

SIXTY-FOURTH CONGRESS

FIRST SESSION

ON

S. 1922

A BILL RELATING TO THE RECLAMATION OF ARID, SEMI-ARID, SWAMP, AND OVERFLOW LANDS THROUGH DISTRICT ORGANIZATIONS, AND AUTHORIZING GOVERNMENT AID THEREFOR

Printed for the use of the Committee on Irrigation and Reclamation of Arid Lands

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

COMMITTEE ON IRRIGATION AND RECLAMATION OF ARID LANDS.

MARCUS A. SMITH, Arizona, *Chairman.*

HARRY LANE, Oregon.	WESLEY L. JONES, Washington.
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JAMES D. PHELAN, California.	THOMAS B. CATRON, New Mexico.

NORRIS D. PARHAM, *Clerk.*

VERNMENT AID THROUGH DISTRICT ORGANIZATIONS.

TUESDAY, MARCH 28, 1916.

UNITED STATES SENATE,
COMMITTEE ON IRRIGATION AND
RECLAMATION OF ARID LANDS,
Washington, D. C.

e committee met at 10.40 o'clock a. m. in room 129, Senate Office ling, pursuant to call, Senator Harry Lane presiding.
esent: Senators Lane (acting chairman), Sheppard, Walsh, s, Sutherland, Borah, and Catron.
so present: Senator Miles Poindexter, of Washington; Mr. L. ice; and Mr. O. Laurgaard.
e CHAIRMAN. The committee has been called for the purpose of dering the bill (S. 1922) relating to the reclamation of arid, rid, swamp, and overflow lands through district organizations, uthorizing Government aid therefor, which the clerk will cause printed in full in the record.

[S. 1922, Sixty-fourth Congress, first session.]

Relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor.

it enacted by the House of Representatives of the United States of ca in Congress assembled, That the declared purpose of this act is to rage the reclamation of lands under laws enacted to that end by the d States, and to provide for the cooperation of the United States in aid or.

2. That whenever any district duly organized under the laws of any having for its purpose the irrigating, draining, or diking of lands within strict, and being authorized by law to issue its bonds to procure funds for rrying out of the purposes of its organization, shall desire the cooperation id of the United States, it shall file with the Secretary of the Interior and estimates of the work proposed to be done for the reclamation of t lands, and shall make application to have such plans and estimates ex- d and approved. The Secretary of the Interior thereupon shall cause an nation to be made of the plans and the district project, and, if the same be deemed feasible, or shall be so modified as to be feasible, the Secretary Interior may, on behalf of the United States, guarantee the interest on to be issued by said district for the purposes aforesaid.

3. That the said district bonds shall run for a period not to exceed years, and the interest to be guaranteed shall not exceed four per centum nnum, and with these limitations each State may prescribe the time and er of the payment of the bonds of its districts. The guaranty upon all shall be conditioned that any defaulting interest shall be paid by the d States; and in case any district shall default in its bond interest and interest shall be paid by the United States under its guaranty, the United s shall have all remedies which are given by law to the bondholder, and nds and interest shall be made by law a lien upon all the lands within istrict.

SEC. 4. That the Secretary of the Interior shall from time to time cause inspection to be made of any work under construction to determine whether the work is being carried out in accordance with the plans submitted, and he may make such rules and regulations as may be necessary to insure the carrying out of the plan approved, and he is further authorized to approve any and all acts and to make all rules and regulations necessary and proper for the purpose of carrying the provisions of this act into full force and effect.

SEC. 5. That any irrigation project which has been completed under the provisions of the reclamation act of June seventeenth, nineteen hundred and two, and of acts amendatory of and supplementary thereto, may be organized into an irrigation district, and the Secretary of the Interior shall accept in payment for work already done and funds advanced upon the project, and for which payment has not been made, bonds of the district to run for a period of not to exceed forty years, and drawing interest at the rate of four per centum per annum. Any irrigation project now under construction under the provisions of said reclamation acts may be organized into an irrigation district, and bonds as in this section mentioned shall be received by the Secretary of the Interior in payment for work already done and funds advanced, and interest on additional bonds sufficient to complete the project may be guaranteed for the purpose of sale, as provided in sections two and three of this act, and any irrigation project authorized under the provisions of said reclamation acts may be organized into an irrigation district and shall be entitled to the rights and privileges granted by sections two and three of this act.

The ACTING CHAIRMAN. The chairman is in receipt of a letter from the Acting Secretary of the Interior submitting a report upon this bill, which is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, March 29, 1916.

MY DEAR SENATOR: Bill S. 1922, referred by you December 18, with request for suggestions, has received careful consideration.

The bill is entitled "A bill relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor."

The fundamental proposition of the bill is that, upon an examination by the Secretary of the Interior of the plans of reclamation of any irrigation or drainage district organized under the laws of any State, the principal and interest of the bonds of such district shall be guaranteed by the United States.

This involves an important question of policy and would be of far-reaching effect. Doubtless the adoption of such a plan would go far toward securing the much-desired development of large areas which are now waste lands in many parts of the country. It is, of course, well understood that, so far as the arid and semiarid lands are concerned, the income now available under the reclamation law, and that which may be expected for a number of years, would not permit a material increase in the area to be reclaimed under projects now laid out. It would therefore be desirable to devise a plan for extending the area to be reclaimed by irrigation and drainage and to adopt some feasible plan of cooperation with the State and its subordinate agencies. Whether the plan proposed by this bill would be the best for the purpose, I can not undertake to say, as the decision of such a question must necessarily rest with the legislative branch.

If this bill or any similar one is to be passed, it is suggested that consideration be given to several amendments which would seem to be necessary for protecting the interests of the United States in carrying out such a plan.

In order to clearly define the character of the districts with which the Government is to deal under this act it is suggested that on page 1 lines 7 and 8 be amended so as to read as follows, the italicized words being inserted:

"That whenever any district duly organized under the laws of any St *as a subordinate agency thereof with taxing power*, having for its purpo etc.

The examination of the plans and estimates as proposed in this bill will volve more or less expense, and it seems proper that the district should furn the necessary funds for that purpose, and furthermore the specifications of work should be fully set forth for the consideration of the Secretary. I therefore suggested that the last clause in lines 2 and 3 shall read as follo *with the italicized* words inserted: "And shall make application to have s *plans and estimates and appropriate specifications* examined and approve

to provide for the payment of such expense by depositing such sum or sums as the Secretary of the Interior may deem necessary."

On page 2, after line 22, insert the following:

"The Attorney General of the United States, upon request of the Secretary of the Interior, shall take such steps as may be necessary to secure the benefit of such remedies in the Federal courts of the United States, upon which jurisdiction for such purpose is hereby conferred, to recover amounts which may be due to the United States hereunder, with interest, and to secure the benefit of any other remedies which may be available."

On page 3, at the end of line 6, insert the following:

"The Secretary of the Interior, through his engineers or inspectors, shall have power to compel any change in work being carried on or which has been performed to agree with the plans approved by him or the modified plans, which he may deem necessary to secure proper construction, and in case of failure to comply therewith shall have the power to prevent further construction or payment therefor."

On page 4 strike out all in lines 2 and 3, after the word "and," and insert the following:

"All the provisions of sections 2 and 3 of this act shall be effective as to any bonds taken by the United States under this section."

Cordially, yours,

ANDRIEUS A. JONES,
Acting Secretary.

Hon. M. A. SMITH,
Chairman Committee on Irrigation and Reclamation of Arid Lands,
United States Senate.

The ACTING CHAIRMAN. Do you wish to make a statement, Senator Jones?

Senator JONES. I asked that this meeting be called for the purpose of considering Senate bill 1922. There are some gentlemen here from the West who would like to have an opportunity to be heard, and present their reasons for urging the passage of this measure. I want to state just briefly what the bill is.

We all appreciate, I think, the conditions with reference to the reclamation of the arid and swamp lands. The reclamation fund is small and probably will all be taken up for several years, at any rate, in taking care of projects that are under way. So that there is not very much hope of being able to get money through the Federal Government to develop any new irrigation enterprises.

Private capital, for some reason, seems to hesitate about going into these enterprises. There are large tracts of arid lands in the West, and there is water that can be carried to reclaim them if capital could be induced to go into it. That is the situation, and there does not seem to be very much hope of getting anything done along this line unless some way can be devised to induce private capital to go into it.

Some of the gentlemen who are interested in the developments of this kind got together and prepared this bill as the best proposition that occurred to them to promote development along these lines. The title of the bill is "A bill relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor."

In brief, it simply provides this: That the United States shall guarantee the interest on bonds of irrigation, drainage or diking districts organized under State laws. These bonds shall run for a period not to exceed 40 years, and the amount of interest guaranteed shall not exceed 4 per cent.

These districts are organized agencies of the State and the bonds are not to be issued until the plans have been submitted to the Secretary of the Interior and he has approved the same. The construction of the works will be under his supervision and control in case he deems it advisable for the Government to guarantee the interest on these bonds.

Then there is also a provision under which any existing irrigation project, if it desires to do so, can bring itself under the terms of the act.

Now, that is a summary of the provisions of the bill. I would like to have the gentlemen who are here who are especially familiar with the needs and what they hope to accomplish under legislation of this kind heard by the committee. I will ask Mr. Rice to arrange the order in which those who want to be heard may be heard. In other words, I will ask him to take charge of the hearing before the committee.

STATEMENT OF MR. L. M. RICE, OF SEATTLE, WASH.

Mr. RICE. I wish first to put into the record, Mr. Chairman, the resolutions which were passed on Saturday before the National Reclamation Conference held in this city.

The ACTING CHAIRMAN. You had better state what this conference was composed of.

Mr. RICE. I will give the origin of the conference. The first conference was held in Seattle with the Washington reclamation interests, and there it was decided to call a conference of the western reclamation interests in San Francisco. That conference was held on the 2d and 3d of December, and they called the national coinference which included both swamp and arid-land reclamation. The national conference met here recently. I have here a copy of the resolutions which were passed by the national conference held in this city on Saturday the 25th of this month. I should like to have this put into the record.

The ACTING CHAIRMAN. They will go in.

(The resolutions referred to are here printed in full, as follows:)

We, the undersigned members of the committee on resolutions, duly appointed by the National Reclamation Conference, in session at Washington City this 25th day of March, 1916, beg to report as follows:

Early in December, 1915, the Western States Reclamation Conference, representing 17 of the Western States, convened in San Francisco, passed resolutions recommending the Senate and House bills hereinafter referred to, was composed of representatives from reclamation, commercial, scien financial, and other bodies of the Great West, and, among other action ta recommended that the president and chairman of the executive committe the Western States Reclamation Conference take steps to call a national ference to be held in Washington City at a day that might be found conven

The Western States Reclamation Conference, through its president and chairman of its executive committee, set about accomplishing the requiren imposed, and the result was the meeting of the National Reclamation ference at Washington City the date aforesaid, at which Gov. James Hawley, of Idaho, was elected president and this committee formed to s its report to the conference for consideration.

We therefore recommend for the consideration of this body a declarn principles and resolutions as follows:

1. That we recommend for passage Senate bill No. 1922, substant *the form and retaining* the essential features thereof, as introduced by

Wesley L. Jones, of Washington, for the reasons that the bill and the principles therein involved represent and state the best methods for the successful working out of reclamation problems, both of arid and swamp lands, in this, that it brings into close cooperation the Federal, the State, and the local district interests in a way that the three may work in harmony toward securing the desired end, to wit, to put these otherwise waste lands into a condition where they will produce wealth and sustain homes. As a result of such legislation the United States would lend its credit to the efforts of the local organizations to secure the necessary funds for construction of the irrigation drainage or reclamation works. It is the belief of this conference that the security offered by the land itself (supplemented by the taxing power of the State under the district law) will prevent any necessity for the advance of funds by the Federal Government to make good the proposed guarantee.

2. We recommend to the favorable consideration of the Congress and the passage of House bill No. 12365, introduced by Representative Addison T. Smith, of Idaho, which bill contains many valuable features and provisions, which, when enacted into law, will enable the working out and putting into successful operation reclamation projects and will remove difficulties that have heretofore confronted the economic development and accomplishment of reclamation projects, and contains additional legislation very essential, particularly at this time, for the practical development of the reclamation work. Such legislation will remove one of the most serious difficulties in the organization and development of irrigation districts by providing a means of taxing the public lands so that they may bear their share of the improvement work and at the same time fully protecting the Federal interests in the public lands.

3. *Resolved*, That the chairman of this conference appoint a committee from the members of the conference to present these resolutions to the proper committees of the Senate and House, and there make such argument and give such reasons as shall properly place the views of this conference before the Members of the Senate and House, and induce all possible favorable action upon the bills aforesaid or any amendments thereof, or any other legislation that may be now before the Congress or hereafter introduced and considered that will tend to bring about the objects and purposes of this gathering and the views expressed by its members.

4. That the president of the National Reclamation Conference be authorized and directed to disseminate as widely as possible the printed copies of the hearings to be secured by the committee appointed as aforesaid.

L. M. RICE, *Washington.*
J. T. HINKLE, *Oregon.*
J. W. LOUGH, *Kansas.*
L. NEWMAN, *Montana.*
W. R. BEATTIE, *Montana.*

Senator WALSH. How was the delegation to this conference made up?

Mr. RICE. It was made up through appointments from governors of States and the Secretary of the Interior, from clearing-house associations, railroad companies, and people generally interested in the reclamation of lands. They came from State granges and reclamation projects. They all had power to appoint delegates to the conference.

Senator WALSH. Have you a list of the delegates?

Mr. RICE. Yes, sir. I have not them here, but I will furnish it for the record.

Senator WALSH. Can you put it in the record?

Mr. RICE. Yes, sir. I think probably the governor has it.

Senator WALSH. How many States were represented there?

Mr. RICE. There was Oregon, Washington, California, Arizona, New Mexico, Texas, Nevada, Montana, Missouri, Arkansas, and Nebraska. I believe those are the ones that I can recall at the present

time. Kansas was also represented, as well as New York, Pennsylvania, and Kentucky.

Senator WALSH. Was the Reclamation Service of the Department of the Interior represented in that conference?

Mr. RICE. Yes, sir; there were three representatives from the Interior Department. That was Mr. Ryan, Mr. Bien, and Mr. Blanchard. They attended each meeting of the conference.

Senator JONES. Might I interrupt you, Senator, right there to say that the bill was referred to the department quite a while ago, and the clerk tells me that the Secretary advised him this morning that the report would be down here this morning. What it is, of course, I do not know.

Senator WALSH. All right. Go on.

Mr. RICE. I have here a copy of the minutes of the meeting of the national conference, giving the membership of the conference.

Senator JONES. I suggest that you hand a copy of it to the reporter, so that it may go in the record.

Mr. RICE. I will.

(The statement referred to is here printed in full, as follows:)

WASHINGTON, D. C., *March 25, 1916.*

Pursuant to call issued by L. M. Rice, chairman of executive committee of the Western States Reclamation Conference, the National Reclamation Conference convened at the New Willard Hotel, Washington, D. C., March 25, 1916, at 10 o'clock a. m., being called to order by John P. Hartman, president of Western States Reclamation Conference, who explained the purpose of this conference, namely, to devise ways and means of promoting the proposed legislation now pending in Congress relative to the reclamation of arid lands, etc., being Senate bill 1922, known as Jones bill.

Ex-Gov. James H. Hawley, of Idaho, was elected temporary chairman and W. O. Hopper, of Kentucky, temporary secretary.

Following delegates seated as duly accredited representatives:

Ex-Gov. James H. Hawley, Boise, Idaho, State of Idaho.

L. M. Rice, Seattle, Horse Heaven district, Wenatchee Heights irrigation district, Yelm district, Laramie district, Brewster district.

J. T. Hinkle, Hermiston, Oreg., North Unit irrigation district, Teel irrigation district, Paradise irrigation district.

Mrs. J. T. Hinkle, Hermiston, Oreg., Umatilla district.

W. R. Beattie, St. Louis, Cotton Belt Route.

O. Laurguard, Portland, Oregon Irrigation Congress, Oregon Society of Engineers, Seattle Lake irrigation district, Central Oregon Irrigation Co.

Ex-Gov. J. N. Gillette, San Francisco, State of California.

Charles P. Ross, Omaha, Union Pacific Railroad.

Morris Bien, Washington, United States Reclamation Service.

Hon. A. T. Smith, Member of Congress, Idaho.

Samuel Fortier, Washington, United States Department of Agriculture.

W. O. Hopper, Mount Sterling, Ky., State of Kentucky.

J. W. Lough, Scott City, Kans., State of Kansas.

John P. Hartman, Seattle, Quincy Valley project.

E. E. Leedy, St. Paul, Great Northern Railroad.

D. V. Jones, Washington, Santa Fe Railroad.

C. J. Blanchard, Washington, United States Reclamation Service.

M. B. Thompson, New Mexico, Elephant Butte Water Users' Associati

E. J. Horn, Wilkinsburg, Pa., State of Pennsylvania.

H. S. Garfield, Oregon, western land district.

Louis Newman, Great Falls, Mont., State of Montana.

R. F. Burgess, El Paso, El Paso District Water Users' Association.

F. H. Allen, 62 Wall Street, New York City.

Hon. J. P. Buchanan, Texas.

Arthur A. Stiles, Texas.

H. B. Walker, Manhattan, Kans.

J. B. Case, Abilene, Kans.

L. P. Reardon, Kansas.

Morris McCauley, Selina, Kans.
T. J. Strickler, Topeka, Kans.
H. E. Lindedge, Great Bend, Kans.
A. T. Hedge, Lincoln, Kans.
E. E. Hopkins, Marienthal, Kans.
Peter Johnson, Hays, Kans.
George E. Parsons, Cairo, Ill.
George H. Campbell, Baltimore & Ohio Railroad.
Samuel G. Stoney, Charleston, S. C.
George W. White, Washington, D. C.
D. C. Henny, Portland, Oreg.
John C. Beattie, Butte, Mont.
W. A. Ryan, Washington, United States Reclamation Service.
George M. Corlett, Denver, Colo., Terrace irrigation district and State of Colorado; San Luis Valley irrigation district.
Charles A. Lory, Denver, Colo.
F. C. Goudy, Denver, Colo.

Senator Wesley L. Jones was introduced and discussed the principal features of the Jones bill. Other speakers were Messrs. Hartman, Rice, Laurgaard, Newman, Bien, Ryan, and Representative Smith, of Idaho.

A committee on resolutions was by motion appointed by the chairman, consisting of Messrs. Rice, Hinkle, Newman, Lough, Beattie, and Hartman. Representative Smith was added to the committee by motion. This committee was instructed to report at 3 o'clock this afternoon, until which time the conference adjourned.

Conference reconvened at 3 p. m., and the chairman called for report of committee on resolutions, which was made by Mr. Rice, as follows:

RESOLUTIONS.

We, the undersigned members of the committee on resolutions, duly appointed by the National Reclamation Conference, in session at Washington City this 25th day of March, 1916, beg to report as follows:

Early in December, 1915, the Western States Reclamation Conference, representing 17 of the Western States, convened in San Francisco, passed resolutions recommending the Senate and House bills hereinafter referred to, and was composed of representatives from reclamation, commercial, scientific, financial, and other bodies of the great West; and, among other action taken, recommended that the president and chairman of the executive committee of the Western States Reclamation Conference take steps to call a national conference to be held in Washington City at a day that might be found convenient.

The Western States Reclamation Conference, through its president and the chairman of its executive committee, set about accomplishing the requirements imposed, and the result was the meeting of the National Reclamation Conference at Washington City the date aforesaid, at which Gov. James H. Hawley, of Idaho, was elected president and this committee formed to submit its report to the conference for consideration.

We therefore recommend for the consideration of this body a declaration of principles and resolutions as follows:

1. That we recommend for passage Senate bill 1922, substantially in the form and retaining the essential features thereof, as introduced by Senator Wesley L. Jones, of Washington, for the reasons that the bill and the principles therein involved represent and state the best methods for the successful working out of reclamation problems, both of arid and swamp lands in this, that it brings into close cooperation the Federal, the State, and the local district interests in a way that the three may work in harmony toward securing the desired end, to wit, to put these otherwise waste lands into a condition where they will produce wealth and sustain homes. As a result of such legislation the United States would lend its credit to the efforts of the local organizations to secure the necessary funds for construction of the irrigation, drainage, or reclamation works. It is the belief of this conference that the security offered by the land itself (supplemented by the taxing power of the State under the district law) will prevent any necessity for the advance of funds by the Federal Government to make good the proposed guaranty.

2. We recommend to the favorable consideration of the Congress and the passage of H. R. No. 12365, introduced by Representative Addison T. Smith, of Idaho, which bill contains many valuable features and provisions which,

when enacted into law, will enable the working out and putting into successful operation reclamation projects, and will remove difficulties that have heretofore confronted the economic development and accomplishment of reclamation projects, and contains additional legislation very essential, particularly at this time, for the practical development of the reclamation work. Such legislation will remove one of the most serious difficulties in the organization and development of irrigation districts by providing a means of taxing the public lands so that they may bear their share of the improvement work and, at the same time, fully protecting the Federal interests in the public lands.

3. *Resolved*, That the chairman of this conference appoint a committee from the members of the conference to present these resolutions to the proper committees of the Senate and House, and there make such argument and give such reasons as shall properly place the views of this conference before the Members of the Senate and House, and induce all possible favorable action upon the bills aforesaid or any amendments thereof, or any other legislation that may be now before the Congress or hereafter introduced and considered that will tend to bring about the objects and purposes of this gathering and the views expressed by its members.

4. That the president of the National Reclamation Conference be authorized and directed to disseminate as widely as possible the printed copies of the hearings to be secured by the committee appointed as aforesaid.

L. M. RICE.
J. T. HINKLE.
J. W. LOUGH.
L. NEWMAN.
W. R. BEATTIE.

Resolutions adopted unanimously.

Mr. Rice submitted a supplemental report as follows:

SUPPLEMENTAL RESOLUTIONS.

The committee on resolutions of the National Reclamation Conference further recommend that suitable action be taken as follows:

1. That this organization, to be known as the National Reclamation Conference, be made permanent by electing proper officers.

2. That the officers consist of a president, one vice president from each State of the Union, a secretary, and an executive committee, to consist of one member from each State of the Union participating now or hereafter in this or any other conference that may be held, and that where an executive committeeman has not been nominated by representatives of any State that such member be selcted by the president and chairman of the executive committee.

3. That the officers of this conference be, and they hereby are, authorized and directed to take all necessary steps to carry out, and on the principles for which the conference stands and the views expressed by the members present.

Supplemental resolutions were unanimously adopted.

Motion prevailed that conference request a hearing before Senate Committee on Irrigation for Monday morning, or as soon thereafter as possible.

On motion by John P. Hartman, the temporary officers were made the permanent officers of the conference.

Legislative committee appointed as follows: Gov. J. M. Gillette, California; Hon. A. T. Smith, Member of Congress, Idaho; Mr. Noland, Missouri; Charles P. Ross, Nebraska; E. C. Leedy, Minnesota; M. B. Thompson, New Mexico; E. J. Horn, Pennsylvania; Louis Newman, Montana; R. J. Burgess, Texas; J. T. Hinkle, Oregon; O. Laurguard, Oregon; W. O. Hopper, Kentucky; L. M. Rice, Washington; George M. Carlett, Colorado; J. W. Lough, Kansas; J. H. Hawley, Idaho.

This committee was also constituted the executive committee of the conferenc.

Moved that executive committee, president, and secretary be empowered to carry on and complete the work contemplated by this conference.

Adjournment.

JOHN P. HAWLEY, *President*,
Boise City, Idaho.
W. O. HOPPER, *Secretary*,
Mount Sterling, Ky.

Mr. RICE. Now I wish to read a statement.

Senator JONES. You may take your own course.

Mr. RICE (reading):

The thing most to be desired in the work of the reclaiming of waste lands is a scheme by means of which a stable security may be issued against them. A scheme by means of which reclamation securities throughout the United States may become uniform in character. This can only be done through having uniform laws through which these securities are issued. Heretofore all laws which have for their object the reclamation of swamp and arid lands have been such as to induce speculation, with the result that every form of reclamation securities which has been put on the market in the past is so discredited as to leave the impression among financiers that reclamation of lands does not pay and can not be made to pay, and the whole scheme of reclamation is bad business. Bad financing is the cause of more reclamation failures than any one thing. The ability of the man on the land to pay was not made the basis upon which to do the financing.

In recent years few irrigation projects were financed with bonds that netted the project much in excess of 80 cents on the dollar. Most of the projects received only 60 cents, which means that the man on the land would eventually have had to pay about two for one for the money that he actually used. It takes from 3 to 4 years to put inorganic soil in a producing condition. During this period the man who is developing these lands should be allowed to do so without the necessity of paying interest upon bonds or excessive taxes. The above being true, it is quite apparent that an early redemption of bonds necessary for the development of a project is out of the question.

If the great good which is to come from the reclamation of our waste lands is to be realized, reclamation projects must be financed in such a way that the man on the land makes his living and profits through the cultivation of his land and through the sale of it. This can only be done by giving him sufficient time in which to bring his land to a producing stage before large payments of any nature come due. The development of wild lands is an earnest work. The man who undertakes to develop a farm while he is making a home for himself is creating wealth for the State and Nation and should be given every encouragement possible by the State and Nation. It is believed that Senate bill 1922, working in conjunction with liberal State reclamation district laws, will accomplish the desired result. It is believed that Senate bill 1922, when enacted, through the rules to be promulgated by the Secretary of the Interior, will soon bring about the enactment of liberal district laws in the States wishing to take advantage of this bill. As soon as this is accomplished and it is proven that these lands can be reclaimed under liberal laws, the securities issued against these districts will become known and understood throughout the financial world, with the result that the guaranty feature of the Jones bill will no longer be a necessity. This bill has been drafted in the interest of agricultural extension by providing a form of rural credit. Its purpose is to make possible the reclamation throughout the Nation of vast fertile areas of desert waste, miasmatic swamps, and overflow lands. The time has come when this class of lands is needed for homes and when the Nation needs its products.

The things most required among our farming population is to cooperate in all of their undertakings. The district plan as mentioned here will be one of the first steps in this direction. Through being able to finance their project by means of cooperation, they will soon learn that they can market their product and buy the things necessary for their operations through cooperation to a better advantage than they can under the present system. In order that this thing may be brought about it becomes necessary that there be a controlling head which supervises not only the enactment of the State laws under which this thing is to be carried out, but also the construction and operation of the various projects. I do not mean to say that it is necessary for the Secretary of the Interior or the Reclamation Service to do the actual construction work in connection with the building of these projects—in fact, I think that would be a mistake—but the Reclamation Service should undertake a general supervision and see that the plans as outlined, to begin with, are carried out as nearly as possible and that the projects as a whole are operated in such a way as to enable the man under the projects to make a living and to pay necessary interest charges against the outstanding securities. In other words, it is necessary that the Reclamation Service cooperate with the officials of the district in the carrying out of these plans and not as a body-guard *or guardian of* the people in the district. It is advice and cooperation

that is needed more than any other one thing in order that the waste lands of this country may be developed and thousands of the people who are at the present time living in the cities from hand to mouth be placed upon these lands in such a way as will enable them to become independent, thus helping to solve to a great extent our industrial troubles.

The multiplication of homes under the provisions of the homestead laws is practically at an end now, because all the good lands have already been occupied; the desert land susceptible of irrigation is not available to the poor man, because most of it is situated so remote from a water supply that the use of large capital is necessary to build suitable irrigation works therefor; and the building of dikes and dams, drains and canals for developing the remaining big projects is too costly for individual effort. Growth of rural population and extension of agricultural boundaries lie almost entirely in the direction of reclaiming waste lands.

When the time comes that a man recognizes that his government is taking a personal interest in him and in his family and is doing those things that are necessary in order to make him a self-respecting, independent, well-living man, he is one; that the government in time of stress can depend upon him to give his energies, his wealth, and his life, if need be, in order to sustain that government. A nation's physical power rests with its yeomanry. The great wealth of every government lies in its people. Without a great people we can never have a great government. Therefore in asking for the passage of this bill we feel that we are only asking the Government to help us over a stony place in the road of development that within a short while after this work is started will become self-sustaining and independent.

The passage of this bill will build up rural settlements by offering actual and real inducements to tillers of the soil, while the Government's liability to loss is only remotely possible. Low rate of interest, long-time bonds, small amortization payment collected by county treasurer, backed with ample security, render redemption certain because easily possible.

If it shall continue to be the policy of the United States Government to assist, encourage, and aid its settlers in the development of new homes, then such policy can remain effective only by virtue of such supplemental legislation as will enable the pioneer settler to finance the reclamation of waste lands.

Senator JONES. Mr. Rice, will you go into a little more detail as to why it is that private capital does not go into these irrigation enterprises especially?

Mr. RICE. Well, it is because there have been so many failures in connection with it.

Senator JONES. Well, why are these failures?

Mr. RICE. Well, the failures are due to the fact, as I said before, that those lands are invariably organic and it requires several years to get them into shape so that they are productive, and during that period of time these farmers are also building their homes and doing things that are necessary in order that they may be able to live. The result is that when the time comes for them to pay they are unable to pay. Oftentimes they are asked to pay for these water rights prior to the time that water has actually come—before the water is on the land at all. Now, the general scheme in connection with this bill is to have our State irrigation-district laws revised in a way so as to enable us to capitalize our interest for the first four years. We have a law in the State of Washington at the present time which was passed by the last State legislature and which enables districts to capitalize their interest for the first four years.

Senator CATRON. What do you mean by capitalizing the interest for the first four years?

Mr. RICE. We issue sufficient bonds on the project to pay the interest on the bonds for the first four years, which is really capitalizing the interest. That allows the man upon the land to go there and develop his place and have four years to get his development started before he is asked to pay anthing.

Senator CATRON. Yes; I understand. That is what I thought you meant.

Mr. RICE. Yes, sir; that is the idea. The whole trouble has been, first, due to the fact that the bonds sold for a very low rate, usually about 60 to 80 cents; second, that in both instances these farmers were called upon to pay before they were in shape to produce the money that they were called upon to pay, and in a good many cases they were asked to pay before the water was actually upon the land. That is the reason why most of all our irrigation projects in the West have failed.

Senator POINDEXTER. In addition to that they were required to pay the principal.

Mr. RICE. Yes; they were required to pay the principal. It was paid off almost at once.

Now, under the plant that we have in our State—in fact, it is now a law in the State of Washington—we give them four years without interest at all. For the next 10 years, up to the end of the eleventh year, they pay the ordinary rate of interest. After that time there is 2 per cent added to it.

Senator SUTHERLAND. What do you mean by that? Does the State advance the interest?

Mr. RICE. We issue sufficient bonds to begin with to build the project and——

Senator CATRON (interposing). You incorporate the first four years' interest in the bonds?

Mr. RICE. Yes, sir; that is the idea.

Senator SUTHERLAND. I understand.

Mr. RICE. Then, up to the end of the eleventh year they pay the ordinary interest. At the end of that time we add 2 per cent to it, which, invested in 4 per cent securities——

Senator SUTHERLAND (interposing). That amounts to your borrowing your four years' interest in advance?

Mr. RICE. Exactly, just like in any other business.

Senator SUTHERLAND. And then you pay the interest on that?

Mr. RICE. Yes, sir; we pay interest on that. It is simply capitalizing the interest. That is done by every railroad that is built at the present time. If we were able, under irrigation projects, to take hold of the absolutely raw land and make it pay, right off the reel, right at once, it would be one of the most remarkable things in the world. There is not a man who goes into any kind of business who does not have to capitalize his business for the first few years. It makes no difference whether he is a lawyer, doctor, or what.

Senator WALSH. That is recognized in the present reclamation law.

Mr. RICE. Yes, sir.

Senator WALSH. This bill contemplates the irrigation of lands that have passed into private ownership?

Mr. RICE. Yes; or lands outside, either one. There is another bill that was introduced in the House by Mr. Smith of Idaho, which gives the districts the power to tax lands that have not passed into private ownership.

Senator WALSH. But this bill deals exclusively with lands that have passed into private ownership, or at least, if within the district there are any public lands, there is no provision in this bill by which

the Government lands shall be subjected to the same charge that is imposed upon the private lands.

Mr. RICE. No.

Senator WALSH. So that it really contemplates the irrigation of lands that have passed into private ownership?

Mr. RICE. Yes, sir.

Senator WALSH. Well, how can you justify the guarantee by the Government of the bonds issued by a district for the improvement of private lands within that district?

Mr. RICE. We justify it from the fact that it helps to build up homes.

Senator WALSH. I was not speaking about it from the economic standpoint, but from a constitutional standpoint.

Senator SUTHERLAND. Not from the moral standpoint.

Mr. RICE. Of course, I am not a lawyer, Senator, and when you begin to talk about constitutional questions I do not know much about it. I can only look at the thing from the standpoint of good business on the part of the Government, to help build up homes.

Senator WALSH. You understand that under the general reclamation law we are improving the Government lands.

Mr. RICE. Yes, sir.

Senator WALSH. And incidentally when we improve the private lands we make the owners of the private lands contribute their proportionate share toward the work, but the basis of it is that the Government is improving its own lands.

Mr. RICE. While that is true, as I understand it, this proposition is simply the question of enabling these people to finance themselves. In other words, it is a guarantee of interest. It enables us to get 4 per cent money. It enables us to allow the people on the land to make their payments as they become due and as they should be made. I know so far as the constitutional question is concerned, I am not acquainted with it at all.

Senator WALSH. Now, another thing. Under this bill the district is organized and the plan is outlined. The Secretary is then called upon to determine whether the plan is feasible or not.

Mr. RICE. Yes, sir.

Senator WALSH. And if it is feasible, upon his judgment, then the guarantee becomes effective. The distribution of the fund, however, the expenditure of the fund, is all in the hands of the local districts.

Mr. RICE. Yes, sir. That is under the control of the local district, under the supervision of the Secretary of the Interior.

Senator WALSH. Would a statute of this kind be availed of in your State?

Mr. RICE. Oh, at once.

Senator WALSH. Where?

Mr. RICE. We have about a million and a half acres of land in the State of Washington that is planned to be irrigated, and every foot of it would take advantage of this statute. The districts in most instances have already been formed.

Senator WALSH. Pardon me, but what is your business?

Mr. RICE. I am a civil engineer.

Senator JONES. Have you a copy of our law there, Mr. Rice?

Mr. RICE. Yes, sir.

Senator JONES. Hand it to the reporter so that it may go in the record.

Senator WALSH. That is the irrigation district law?

Mr. RICE. Yes, sir.

(The copy of the Washington irrigation law above referred to is here printed in full, as follows:)

AN ACT Relating to the issuance and sale of irrigation-district bonds and providing for acceptance of Federal aid in the sale or disposal thereof.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That any irrigation district now organized, or hereafter to be organized, under the laws of this State, shall have the power to issue its bonds to run for a period of 40 years, at the rate of interest and to be paid in the manner hereinafter provided, and for the purposes or for any purpose prescribed by the irrigation district laws of the State in force at time of issuance of said bonds.

SEC. 2. The board of directors of the district shall estimate and determine the amount necessary to be raised, including in such amount a sum sufficient to pay the first four years' interest to accrue upon said bonds, and shall immediately thereafter call a special election. At such election there shall be submitted to the electors of said district the proposition whether or not the bonds of the district in the estimated amount shall be issued. The ballots shall contain the words, "Bonds under 40-year plan—'Yes,'" or "Bonds under 40-year plan—'No,'" or words equivalent thereto. If a majority of the votes cast at the election are in favor of the proposition the board of directors shall immediately cause bonds in the estimated amount to be issued; if the majority of the votes cast are against the proposition, the result shall be so declared and entered of record in the minutes of the district. Said bonds shall be payable in gold coin of the United States 40 years from date of issue, and shall bear interest at a rate not to exceed 6 per cent per annum, payable semiannually on the 1st day of January and July in each year. The first four years' interest shall be paid out of the sum included for that purpose in the estimated amount of the principal of said bonds, and the remaining interest shall be paid by revenue derived by an annual assessment upon the lands within the district, the first assessment therefor to be made during the fourth year so as to provide revenue to pay the interest accruing on the fifth year, and annual assessments shall thereafter be made as provided by law. The principal sum of the bonds shall be paid in the manner following, to wit: Beginning with the eleventh year, and each year thereafter, there shall be levied an additional assessment of 2 per cent of the amount of said bonds, said assessment to be made and paid in the same manner and at the same time as assessments to meet the interest, and as such 2 per cent shall be collected, the same shall be paid into a fund to be held by the county treasurer as a sinking fund, and the moneys coming into said fund to be withdrawn and to be invested under warrant and order of the board of directors. The amount in said fund and all interest accruing and compounded thereon by reason of investment shall be kept invested by the board of directors for the purpose of providing a fund for the payment of the bonds at maturity, and said fund with all accruing and compounded interest shall constitute a fund for the payment of the principal of said bonds. The investment herein provided for shall be made only in those securities which are made a matter of investment for the common school fund of the State by the laws of this State.

If at the date of the last levy of assessment before the maturity of said bonds there shall not have accumulated a sufficient amount to pay the principal of said bonds, the board of directors must make an additional levy sufficient, when added to the accumulated fund, to pay off and retire said bonds at maturity.

SEC. 3. The bonds provided for by this act shall be issued for the purposes prescribed by law for irrigation districts. The manner of calling and holding elections for the issuance of the bonds, the form of the bonds, the lien of the bonds upon the lands of the district, the levy and collection of assessments, and each and every other matter or proceeding relating to the issuance, sale, and payment of bonds shall be conducted and shall be in conformity with the law of this State providing for the organization and government of irrigation districts and the sale of bonds arising therefrom, except as otherwise expressly declared and provided in this act. The proceedings for confirmation shall be had as in cases of other bonds issued by an irrigation district.

SEC. 4. If any irrigation district, prior to the passage of this act, shall have authorized an issue of bonds, the board of directors may submit to the qualified electors of the district the proposition whether or not bonds as herein provided shall be issued in lieu of the bonds theretofore authorized; and if a majority of the votes cast at such election are in favor of said proposition, then the bonds theretofore authorized shall be canceled and the bonds herein provided for shall be issued and may be sold in lieu of or in exchange for the former issue: *Provided*, That if some or all of the bonds of the prior issue have been sold, then such outstanding bonds shall not be disturbed or their obligation impaired, unless the holders shall consent thereto and surrender the outstanding bonds for cancellation as may be agreed upon with the district.

SEC. 5. Nothing herein contained shall be construed as in any manner repealing the original irrigation district act, or any acts amendatory thereof, or as in any manner impairing the validity of bonds heretofore issued, or as repealing the method of bond issue provided in said act and amendatory acts, but this act is intended and shall be considered as providing an alternative plan for the issuance of irrigation district bonds.

SEC. 6. If the United States, under any act of Congress or under rules and regulations adopted by the Secretary of the Interior, shall be willing to guarantee the interest upon bonds of any irrigation district, or shall be willing to receive bonds of any such district in payment of, or as security for payment upon, any contract of the United States, then the United States shall have all the remedies given by law to a bondholder, and in cases of payment under any guaranty the United States shall be subrogated to all the rights and remedies of the bondholder to the extent of any such payment; and the United States, or its proper department officers, may make such rules and regulations as may be necessary for the purpose of insuring the carrying out of any plan or project which may have been approved by them as the basis of any guaranty.

Passed by the legislature.

Signed by Gov. Lister March 16, 1915.

Senator JONES. Mr. Rice, irrespective of its bearing upon the constitutionality or unconstitutionality of this bill, do you not think it would be a mighty wise provision to incorporate in this bill a condition under which public lands can be subjected to its terms?

Mr. RICE. Yes, sir.

Senator WALSH. In these regions you have in mind, are there public lands dispersed among lands in private ownership?

Mr. RICE. Yes, sir. Now, in the Horse Heaven district there are about 100,000 acres out of 400,000. In the Quincy district, out of 400,000 acres, there are about 75,000 acres of Government land.

Senator WALSH. Are these organized districts?

Mr. RICE. Yes, sir; they are organized districts. They are organized under the laws of the State of Washington. In fact, all of our irrigation projects are going into districts.

Now, I wish to say this: That in every instance where we have had projects in Washington that were developed along other lines in recent years they have gone in under the district plan. Wherever they have been developed there has been no trouble in disposing of the bonds. I have reference to a district in the Kittitas Valley with which I was connected in 1904. Two years ago they worked it into the form of a district and issued bonds, and to-day the thing is being operated by the district very successfully. They are paying the interest on the bonds and meeting all obligations. The same is true of the Union Gap irrigation district. I think Gov. Gillette can tell you the same thing.

So that we think it is possible, from the experience that we have had in connection with the development of these projects, that as soon as you give a man the chance to develop his land there will be no trouble about taking care of the interest. I believe that under proper supervision the Government will never be called upon to pay a cent

of interest upon these bonds, but the mere psychological part of the proposition enables us to secure money at 100 cents on the dollar instead of 60 cents on the dollar.

Senator JONES. Would it not be almost necessary for the success of this proposition to have the Government lands subjected to the terms of it?

Mr. RICE. Yes, sir. The bill that has been introduced in the House covers that feature.

Senator JONES. I know; but it ought to be incorporated in this measure, so that if this measure gets through and the other does not, it will be in the law.

Mr. RICE. Yes, sir; that should be incorporated in the bill undoubtedly.

Senator SUTHERLAND. Would not the same result follow if the State guarantees the interest?

Mr. RICE. Well, yes and no. So far as the State of Washington is concerned, Senator, we would have to change the constitution of the State before the State could do that.

Senator SUTHERLAND. I am afraid you will have to change the Constitution of the United States before we can do that.

Mr. RICE. Well, I do not know. You have a precedent. The Government guaranteed the interest on the bonds for the Union Pacific Railroad.

Senator SUTHERLAND. That was a different proposition.

Senator WALSH. That was a post and military road proposition.

Mr. RICE. Well, I do not know anything about that part of it. I was speaking simply of the necessity for it, the desire for it. It is a necessity. If we are going to develop those lands out there in anything like a reasonable way, we have got to have something of this kind. It is absolutely necessary. It is not right, it is not just, to let things stand as they are.

Now, you see, the Government is a party at least on one side of every deal in the West, except probably in the State of Texas, when a man takes hold of a piece of land. In practically every case where a man takes land the Government is on one side and the settler is on the other side.

Senator JONES. Have you anybody else who desires to be heard?

Mr. RICE. Yes, sir. I would like to present Mr. Laurgaard.

STATEMENT OF MR. O. LAURGAARD, CONSULTING ENGINEER, PORTLAND, OREG.

Mr. LAURGAARD. One of the principal reasons why the State of Oregon and myself personally favor the Jones bill, S. 1922, is the fact that the reclamation fund is practically depleted. In the conference on Saturday we learned from the reclamation officials that it will require practicaly $70,000,000 or more to complete the projects which have already been commenced by the Reclamation Service, without attempting any new projects in the West.

In Oregon we have approximately 30 projects which I have listed, none of which has been attempted by the Reclamation Service as far as construction is concerned and which include about 1,200,000 acres. These projects have not commenced construction, although a few of them have done a small part of the work. Under the Carey Act we

have 330,000 acres, with an average cost of $44 an acre to complete. Under the district organization plan we have 10 organized irrigation districts, comprising 318,000 acres, with an average estimated cost of $46 per acre to complete. Under private control or contemplated projects which may eventually be constructed under the district plan, we have 428,000 acres, which will average between $50 and $60 per acre.

In almost every irrigation State in the West similar conditions prevail to a greater or less degree. In order that these lands which are included now in these district organizations and attempted under the Carey Act shall be completed, some other plan or method must be looked to than the Reclamation Service, because, as shown here, for Oregon it will require between $60,000,000 and $100,000,000 alone to reclaim all the lands which are feasible in the arid portion of the State, in addition to the swamp and overflow land. The fact that irrigation securities find no market in financial circles is chiefly because the irrigation business has been overexploited on the wrong basis and there have been too many failures. Similarly the irrigation district propositions that have been put through have been put through on the basis of a large discount on the bonds, the payment of interest charges immediately, and, as Mr. Rice pointed out, is impossible to be conducive of success.

The passage of Senate bill 1922 would probably cause the Secretary of the Interior to require practically uniform irrigation district laws throughout the entire West. This will stabilize the securities so that in financial circles when you mention irrigation district securities they will be practically uniform in nature, which will be a great advantage over the present system.

Now, when you mention irrigation securities at the present time you have a long siege of education to bring out the particular form of security that you are considering. One point that was brought out by Mr. Rice that I wish to elaborate on is that this method need not necessarily revolutionize the irrigation methods of the Government, inasmuch as the Reclamation Service has already adopted the policy of using Government funds for irrigation of the arid lands in the West not only for Government lands but also for private lands. Senate bill 1922 has the additional advantage, however, over the ordinary reclamation projects undertaken under the reclamation act, that practically all the lands are at least filed on; that you do not have to go out and advertise for home seekers or find settlers for the land. For the most part the lands are already settled. I wish to paint a picture for the committee on some of the projects in Oregon which I am very familiar with.

Some four or five years ago on the North Unit district, which comprises 99,000 acres; on the Suttles Lake district, which comprises 35,000 acres; on the Ochoca district, comprising some 16,000 acres; the Silver Lake project, 60,000 acres; the Teel district, 30,000 acres; Paradise district, 45,000 acres; and so on, the settlers filed on those lands under the homestead and other Government land acts, most of them coming from the Eastern States by reason of publicity, advertising, and seemingly attractive inducements.

The small savings which they brought with them were put into *the small dwelling* houses, fencing the places, plowing and otherwise *preparing the soil* for dry-farming methods. After attempting to

make a living in this manner for the past four or five years they have now reached the stage where they have discovered that it is absolutely impossible to longer endure the hardships without remuneration, and must abandon their places if no method can be evolved whereby they can put the water which is available on their lands.

Senator CATRON. What do you mean by that? Is the situation such down there, legally or otherwise, that there is available water which they are not allowed to put on the land?

Mr. LAURGAARD. I mean that the water is available in the river tributary to the lands which are held by the settlers and that the cost of applying the water on the land by irrigation is too great for them to raise the money. Therefore they formed these irrigation districts, which are legal municipalities, by State law, backed by the taxing power of the State. They are authorized by the State law to issue bonds with which to construct the necessary dams on the river, and the canal works, and thus lead the water on to the land and make it productive.

Now, I wish to say when they went on the land they thought, from the representations which were made at the time they filed on the land, that it was suitable for dry-farming purposes and cultivation, but after four or five years of trial they find it is utterly impossible to make a living on the land without irrigation. The advantage of such districts over the present reclamation service projects is that the settlers are already on the lands. The lands are already plowed and prepared for irrigation. As a rule, the higher the lands the more fertile and better adapted to irrigation they are.

A further point which I desire to bring out is this: That Government aid to tide over the settlers during the construction period, and possibly for a year or two while they are preparing their places, is in the form of a rural credit. In British Columbia their rural-credit bill includes not only the farm lands alone but also assistance in the construction of farm buildings, irrigation and drainage of their lands, and other rural improvements. Therefore I contend that the aid the actual settlers in districts incorporated under State laws, in which they pledge not only their individual assets but also the entire community assets and property as security for the bonds, is really the best form of rural credits.

Senator SUTHERLAND. That is the provincial law?

Mr. LAURGAARD. Yes, sir.

Senator SUTHERLAND. Not a Dominion law?

Mr. LAURGAARD. Well, it is the law in British Columbia. It is also similar to the law in Australia and New Zealand.

The ACTING CHAIRMAN. It has been going on in New Zealand for 35 or 40 years without the loss of a dollar.

Mr. LAURGAARD. Yes, sir. I wish also to bring out another point in this connection, and that is this: That under an irrigation district law, such as is now in force in the States of Washington, Oregon, and California, after the water is on the land the bonds are sought for by investment brokers and trust companies on account of the very good security back of the bonds. But, like all other construction bonds during the period of the construction of the improvement, either power development, railroad, or other construction work, there is no source from which to derive the interest on those bonds, and *it is only for that* period that these settlers require the aid of the

Government in the payment of interest charges. Furthermore, should the Government guarantee be placed on the bonds, the money could be obtained at par, or possibly at a premium on the par value, and the interest rate would run down to some 3½ per cent to 4 per cent in place of the usual 6 per cent.

Senator SUTHERLAND. Why has not the State of Oregon undertaken to do this?

Mr. LAURGAARD. They are undertaking to do so at the present time under the State guarantee plan.

A bill has been prepared to be submitted by the initiative at the election this coming fall to amend our constitution so the State can lend its credit.

Senator SUTHERLAND. We have in my own State a provision by which State money is loaned to these State projects when they are approved by certain State officials at 4 per cent. That has been in operation for a great many years. There have been quite a number of these irrigation projects constructed under that arrangement.

Mr. LAURGAARD. In Oregon, besides these irrigation projects which I have mentioned, there are numerous drainage projects taking advantage of our local drainage district laws which were formed at the last session of the legislature. But that is a subject that I have not been so actively interested in as the irrigation end of it. Therefore I am not prepared to speak on it.

Senator WALSH. What do you think are the prospects of securing an amendment to the constitution and the adoption of the act that you speak of?

Mr. LAURGAARD. About two weeks ago, at our capital in Oregon, we held a conference to consider rural credits and State aid for irrigation and drainage projects. At that conference the Farmers' Union, the State granges, the labor organizations throughout the State, the Oregon Irrigation Congress, and all other large organizations were represented. A committee was appointed to draft a constitutional amendment for State aid in rural credits. Another committee was appointed, consisting of three members, to draft a constitutional amendment to consider State aid for irrigation and drainage districts. I can say this much, that in Portland, which represents, roughly, about one-third of the assessed valuation of the State and one-third of the population, that the Morning Oregonian, the leading Republican newspaper, is in favor of State aid for all three subjects, and also the Oregon Journal, the leading Democratic paper of the State, is in favor of all three measures; so that we in Oregon consider that the chances are very good.

Senator WALSH. What line of argument is put up by those who oppose that plan?

Mr. LAURGAARD. There are very few who oppose the plan. I mean to say there is no organized effort against it. The only people who have voiced any opposition to it are those situated on the coast or west of the mountains, where there is a great deal of rainfall, and where the lands are already improved. They desire only farm land loans and do not see the need for the irrigation and drainage portion of it. But, so far as I know, there is no organized effort against the plan.

Senator WALSH. That is, they oppose it on the ground that *economically it is an unjustifiable* expenditure?

Mr. LAURGAARD. No; I would not say that exactly. The greater portion of the farming element and the labor element throughout the State favor rural credits, but on account of the sectional difference in the climate there may be some difference of opinion as to the advisability of the State lending its credit for irrigation or drainge purposes.

Senator SUTHERLAND. That is, they think that the benefit would be of a sectional character, I suppose. The eastern part of the State would get the benefit from it, while the western part of the State would not. The coast part of the State would get little benefit from the reclamation of the lands.

Mr. LAURGAARD. Yes; when you separate the irrigation and the drainage from the farm land loans, that is the attitude. But the view that I take, and that is the view taken by a great many of us in the conference, is that we are all in favor of rural credits, but we simply divide it into different features, farm land loans, aid for drainage, aid for irrigation, and so on.

Senator SUTHERLAND. Now, in addition to the question as to the constitutionality of this bill, is it not true that this would operate so as to unequally, and very unequally, develop certain portions of the United States? Would it not be of vastly more benefit in some sections than in other sections of the country?

Senator BORAH. In the West more than the East?

Senator SUTHERLAND. Yes. After all, it would be unequal?

Mr. LAURGAARD. No; I would not say that.

Mr. RICE. There are more swamp lands in the United States to be reclaimed than there are arid lands in the West that can be reclaimed.

Senator SUTHERLAND. Well, take the States like Rhode Island?

Mr. RICE. Well, the New England States would not be benefited to such an extent as the Middle and Western States.

Senator POINDEXTER. In the New England States a great amount of money has been spent out of the Public Treasury for recovering forests.

Senator SUTHERLAND. That was in the interest of navigation, I suppose.

Mr. LAURGAARD. I might state that I indorse the principles contained in this bill, Senate bill 1922, and would like to see same become law, but I do not necessarily favor all the clauses in the bill. There are possibly some changes that could be made to the advantage of the bill. For instance, no provision is made for reimbursement to the Government for examination, investigation, and supervision of these projects. There should be a clause in the bill that would definitely state that the Department of the Interior should be reimbursed regardless of whether or not the report should be favorable; the district should pay for the investigation.

Senator WALSH. But if the report was unfavorable they would not have any money.

Mr. LAURGAARD. They would have the bonds.

Senator WALSH. But the bonds would not be salable without the guarantee.

Mr. LAURGAARD. Now, in districts where they are properly organized, the bonds are valid liens against all the land in the district. No particular piece of land is covered by it. Before they can dis-

incorporate, all the outstanding bonds and all indebtedness must be paid off.

Senator SUTHERLAND. Is that the law of Oregon?

Mr. LAURGAARD. Yes. As an instance of that, I can point to a district in the State of Washington which was formed, I believe, something like over 20 years ago. Hard times came along and the project was not completed, but a contractor had accepted a portion of a bond issue for some work, and those bonds remained a lien against that property and the taxes were collected to pay the interest on those bonds continuously over this lang period. Subsequently a town was platted on some of the land and the assessments were made and collected from each lot. The assessments for interest and principal are collected by the county treasurers of the respective counties in which the districts lie, in the same manner as the school district tax and other taxes.

Senator SUTHERLAND. That is practically the same as the law in California.

Mr. LAURGAARD. Yes; the original Oregon law was copied from the California law.

Senator SUTHERLAND. Do they have any difficulty in marketing those bonds under such circumstances?

Mr. LAURGAARD. Yes. The difficulty, as I pointed out previously, is that we can give them no assurance that the interest is going to be paid during the construction period.

For instance, a project such as the North Unit project in Oregon, which comprises practically 100,000 acres, required about three years to construct, with canals, dams, and reservoirs, and until the project is constructed there will be no money available to pay the interest.

Senator SUTHERLAND. I understand that in Washington they borrow the amount necessary to pay the interest.

Mr. LAURGAARD. They have the power there to borrow it.

Senator SUTHERLAND. They have the power to borrow it, and they can do it.

Mr. LAURGAARD. That does not always mean that they can get the financiers in the financial centers to take the bonds.

Senator CATRON. I understood the other gentleman to say that they incorporated the first four years' interest in the bonds, so that there would be no interest to be paid during the first four years.

Mr. LAURGAARD. That is possible in Washington. That is the only State I know of in which that is done.

Senator SUTHERLAND. I happen to know about a little irrigation enterprise in Idaho. They have a somewhat similar law there. The bonds were issued some years ago, maturing in series, and they have been maintained at par all the time.

Mr. LAURGAARD. Yes.

Senator SUTHERLAND. They have sold above par. That is the New Sweden Irrigation Co.

Senator BORAH. Where is that?

Mr. LAURGAARD. In the eastern part of Idaho.

Senator SUTHERLAND. They have been sold in Salt Lake, and some years ago they sold above par—at 102 and 103.

Senator CATRON. At what rate of interest?

Senator SUTHERLAND. Six per cent interest. California has some of those enterprises in the San Joaquin Valley, some four or five of

them, and while the bonds have not sold at par they have sold at a pretty good rate. They are increasing in value all the time.

Mr. LAURGAARD. I think I can explain that to you, Senator. The same condition exists in some of our districts in Oregon, and also in Washington. There are portions of the land that are easily irrigated, and when they are included in some new raw land and formed into a district, then the entire district becomes land that is irrigated and very rich crops are grown. There is no trouble at all in disposing of securities of such projects.

Senator SUTHERLAND. How do you expect to get past the first period of three or four years under a scheme by which the bonds are guaranteed? The interest has got to be paid, and you say you do not expect the Government to pay the interest. The farmers will have to pay it in some way.

Mr. LAURGAARD. I do not believe I have made the statement, Senator, that the Government would not have to pay it.

Senator SUTHERLAND. Does this plan contemplate that after four years the Government of the United States shall pay the interest?

Mr. LAURGAARD. That bill, as I understand it, provides that if any interest is defaulting from any irrigation district for which the Government has guaranteed the interest, they shall pay the interest that is defaulted and accept district bonds in lieu of such advances.

Senator SUTHERLAND. I know; but the gentleman who preceded you said that would not become necessary because the fact that the Government was behind the bond would have a psychological effect upon the purchasers, so that it would make the bonds much more profitable and get more money out of them, and you would not have to call upon the Government.

Mr. LAURGAARD. It is possible that that might be the effect if, as in the State of Washington, they have a law which provides that the district shall pay the interest itself with another bond issue. It is possible to dispose of the construction bonds issued, including a sufficient amount of bonds to offset the interest during the first four or five year period. But in the other States they would have to amend their district laws to include that feature.

Senator WALSH. What do you say with respect to public lands?

Mr. LAURGAARD. They are included in the districts, and just as soon as the land is patented to the entryman they are then liable, just like any other private lands in the district.

Senator WALSH. But what I mean is this: You organize your district, and all lands held in private ownership become immediately subject to the burden?

Mr. LAURGAARD. Yes.

Senator WALSH. And the taxes may be collected from the owners of this land to meet the interest on those bonds?

Mr. LAURGAARD. Yes, sir.

Senator WALSH. And eventually to retire the bonds?

Mr. LAURGAARD. Yes, sir.

Senator WALSH. But public lands are also within the bounds of the district?

Mr. LAURGAARD. Yes, sir.

Senator WALSH. And those public lands are under the ditch?

Mr. LAURGAARD. Yes, sir.

Senator WALSH. When the land is eventually entered it falls under the obligations of the district.

Mr. LAURGAARD. Yes; but the laws are not retroactive. They can not collect any of the past assessments which have been due from Government lands.

Senator WALSH. Exactly; now, suppose that this thing went along——

Mr. LAURGAARD (interposing). Pardon me, Senator—except if the entryman executes a contract with the district to assume the obligation.

Senator WALSH. But assume the case of a tract that has not been entered at all.

Mr. LAURGAARD. Yes, sir.

Senator WALSH. You are making a law now for the entire United States, you know?

Mr. LAURGAARD. Yes, sir.

Senator WALSH. Let us for the purpose of illustration take the case where the land is not entered until after the bonds are actually retired—all paid off.

Mr. LAURGAARD. Then they would have to petition the district to be included, receive the benefits, and then they would have to pay their just proportion of the cost.

Senator WALSH. Does your law so provide?

Mr. LAURGAARD. Yes, sir. At any time lands which have not been included in the district and received the benefits can petition the directors of the district, and then if the water is available and all other conditions favorable they will be included, but these important matters must be considered when the application to be included is made.

I believe that this bill should be supplemented by the bill (H. R. 262) which has been introduced by Representative Smith of Idaho, which provides that these liens shall apply to Government lands included in these irrigation districts, for the reason that a few failures of irrigation districts in Colorado and other Western States were due to the fact that a large proportion of the lands within these organized districts was Government land.

Senator WALSH. What is your plan with respect to that? You say the land in the organized district is one-third Government land. Here is an irrigation district where half of the lands are held in private ownership and the system is complete, and those parties are getting the benefit out of it and the interest is being paid annually on the bonds. Would you make the Government liable for its proportionate share of interest on the bonds and make it contribute to the irrigation district treasury just the same as other owners of land do?

Mr. LAURGAARD. No, sir; I think that is included in the bill introduced by Mr. Smith of Idaho in the House, which provides that the liens shall be established on those lands in the land office in such a way that when a patent is issued then the entryman will be required to pay all previous assessments before he receives his patent, but that no obligation shall be laid on the United States Government.

Senator WALSH. What is your occupation?

Mr. LAURGAARD. I am a consulting irrigation engineer.

(Thereupon, at 11.50 a. m., the committee adjourned to meet at 10.30 o'clock a. m. to-morrow, Wednesday, March 29, 1916.)

GOVERNMENT AID THROUGH DISTRICT ORGANIZATIONS.

WEDNESDAY, MARCH 29, 1916.

UNITED STATES SENATE,
COMMITTEE ON IRRIGATION AND
RECLAMATION OF ARID LANDS,
Washington, D. C.

The committee met at 10.40 o'clock a. m. in room 129, Senate Office Building, pursuant to adjournment, Senator Thomas J. Walsh presiding.

Present: Senators Walsh, (acting chairman), Jones, Sutherland, and Works.

Also present: Mr. J. T. Hinkle, Mr. Will R. King, and Mr. O. Laurgaard.

The committee resumed the consideration of the bill (S. 1922) relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor.

The ACTING CHAIRMAN. The committee will first hear Mr. Hinkle.

STATEMENT OF MR. J. T. HINKLE, REPRESENTING THE OREGON IRRIGATION CONGRESS, OF HERMISTON, OREG.

The ACTING CHAIRMAN. State your name, please, and your residence.

Mr. HINKLE. J. T. Hinkle, Hermiston, Oreg.

The ACTING CHAIRMAN. And your occupation?

Mr. HINKLE. Representing the Oregon Irrigation Congress.

The ACTING CHAIRMAN. What is your business?

Mr. HINKLE. My occupation is lawyer and farmer.

The ACTING CHAIRMAN. What is the Oregon Irrigation Congress?

Mr. HINKLE. The Oregon Irrigation Congress is an organization composed of representatives from the various districts, private irrigation projects, Government irrigation projects, commercial clubs, and chambers of commerce in irrigated territory.

The people of Oregon are strongly in favor of the Jones bill and also the bill introduced by Congressman Smith of Idaho, H. R. 12365. The reasons are, first, that it promotes the development of the arid and swamp lands in all the States of the Union, making new homes for the people, providing for the natural increase in wealth and population consistent with the hopes and desires of every American citizen to make this the greatest country on earth. The advantages are uniform reclamation laws pertaining to all the States, a long time, low rate of interest to the people for the development of

their lands, and a proper and natural classification of irrigation and drainage land securities.

The great trouble now is that we have too many kinds of bonds, too many schemes for the development of our lands. There is no concerted action. It is every fellow for himself and the devil take the hindmost. What we want is a bill that will insure the Federal Government protecting the developer of the waste places and also protect the man who invests his money in these securities.

In the State of Oregon the reclamation fund, as now constituted, is entirely inadequate to meet the natural demands for the development of the country. That is true of all the arid States of the West.

Senator WORKS. Do you understand this bill to be intended to cover the cases of irrigation districts organized in the States for the irrigation of private lands?

Mr. HINKLE. Well, both private and public lands.

Senator WORKS. Well, it does include districts organized under the State laws, and it is for the purpose of irrigating private lands alone. Is not that so?

Mr. HINKLE. Well, not necessarily; no sir. It would cover both propositions.

Senator WORKS. I know it would cover both propositions, but it includes just that, does it not?

Mr. HINKLE. No. I do not understand it that way.

Senator WORKS. What do you understand about it, Senator Jones? You are the instigator of this legislation.

Senator JONES. Well, I am the instigator in the way that I introduced it, but this bill was prepared, as I understand it, by a committee out in Seattle, Wash., who were interested in matters of this kind. Of course, the bill in its terms, I suppose, could not affect Government lands, because there is no way of divesting the title. I think the bill ought to be amended in that way, because in our State there is hardly a district that could be organized in which there is no public land. I think the bill would need to be amended in that particular, not only for the purpose of giving the Federal Government the constitutional right to act, but also as a practical proposition to make it successful, because there are a good many districts in our State that could be organized that really would not be a success unless the Government land was included within the district and made subject to the terms of the law.

Senator WORKS. What is occurring to my mind is that Congress has no right to legislate respecting irrigation projects within the States, whether it includes public lands or not.

Senator JONES. Well, of course, all this bill does is to guarantee the interest on bonds that are issued. Of course, there is a question of whether we would have a constitutional right to do that or not.

Senator WORKS. I understand that we are to guarantee the interest on bonds issued by private corporations operating within the States?

Senator JONES. That is the proposition involved in the bill.

The ACTING CHAIRMAN. Municipal corporations, not private corporations, Senator.

Senator JONES. Yes; State corporations.

Senator WORKS. But that does not seem to alter the case—the fact that they are municipal rather than private corporations.

Senator SUTHERLAND. I listened yesterday, Mr. Chairman, to the statements that were made by witnesses, and it occurred to me that we need light on the question of our power to pass a law of this kind a good deal more than we do upon the question of its practical benefit if it should be passed. I think we probably all agree that it would be of practical use to the farmers who are engaged in these enterprises.

Mr. HINKLE. This bill is held constitutional by some very good lawyers. I do not pretend to be a very good lawyer, but constitutional questions are largely a matter of opinion. Things that were unconstitutional a few years ago are constitutional to-day, and vice versa. I think that with the ability that we have assembled here at the National Capital we could very easily overcome any constitutional objection that could be raised against this bill.

The ACTING CHAIRMAN. If you do not feel competent to discuss that feature of it go on to the economic features of it.

Mr. HINKLE. That is about all I wish to say.

Senator WORKS. I think there is something more than a mere constitutional question involved. It is a serious question whether the Government ought to embark on this proposition at all, as a matter of public policy.

The ACTING CHAIRMAN. Have you anything to say on that line? Now, we will assume that the Government has the power. Why do you want us to pass a law under which the Government will guarantee the payment of interest upon these bonds issued by these local organizations any more than bonds issued by a school district for the purpose of building schools?

Mr. HINKLE. Well, I want it for the sake of uniformity and for the protection of all the people, not only the borrower of money but also the lender of money. There has got to be some central head to the thing. The Reclamation Service, under the Secretary of the Interior, ought to take a hand in this matter and supervise it and examine these projects and separate the sheep from the goats and not let a lot of badly-managed securities float about the country. That is what gives a black eye to the development of these enterprises. If that is not a national province, I do not know what is.

The ACTING CHAIRMAN. How would you distinguish the guaranteeing of interest on irrigation-district bonds from the guaranteeing of interest on school-district bonds?

Mr. HINKLE. Well——

The ACTING CHAIRMAN (interposing). Let us take a road district, for instance.

Mr. HINKLE (continuing). That is true. The school district, of course, has not been wildcatted like various real-estate promotions. We have in Oregon a law that is practically on the same basis. It puts irrigation securities on the same basis as street-improvement bonds and school-district bonds. In that respect the bonds are as good as any others. Irrigation-district bonds in California, under a similar law, have reached a standing equal to that of the best municipal securities.

Senator WORKS. Does the State guarantee the interest on the principal of the bonds in Oregon?

Mr. HINKLE. The State only guarantees the taxing power. It gives the same guaranty to irrigation-district bonds that it gives

to school-district bonds and street-improvement bonds under the Bancroft act. It covers city-improvement bonds. All the guarantee it gives is the taxing power of the State. In Oregon the assessments that are levied in the irrigation districts go upon the assessement books the same as the county taxes.

Senator WORKS. That is true in California, but that does not amount to a guaranty by the State.

Mr. HINKLE. That is all the guaranty the State could give under the present constitutional limitation.

The ACTING CHAIRMAN. Are you in favor of the movement to amend the Constitution of Oregon so as to provide for a State guaranty?

Mr. HINKLE. Yes; I favor that, although I think that the Jones bill, or the essential features of it, if enacted, would render that entirely unnecessary.

The ACTING CHAIRMAN. Of course, if you get a national guaranty, there would be no need of a State guaranty. But assume, now, that that for constitutional and other reasons, it is found impossible to get a national guaranty. Would you then favor the State guaranty amending the State constitution in order that it might be done?

Mr. HINKLE. Yes; I think that the States ought to change that constitutional limitation. The State of Oregon has gone farther, perhaps, than any other State in the Union in making a direct appropriation of $150,000 for the building of an irrigation project. The money was appropriated by the State and the project was built by the State under the supervision of Mr. Laurgaard, who was before you yesterday.

Senator WORKS. Was that to irrigate private land?

Mr. HINKLE. Private land and public land. It was a defunct Carey Act project.

The ACTING CHAIRMAN. That is, the State, under the Carey Act, went on itself and constructed the works?

Mr. HINKLE. Yes.

The ACTING CHAIRMAN. That is, having let it out to a private contractor who failed and abandoned his contract, the State itself went on and did the work?

Mr. HINKLE. Yes, sir.

The ACTING CHAIRMAN. I am told that there is some arrangement by which the State of Oregon works conjointly with the National Government in some reclamation projects?

Mr. HINKLE. Yes. We have gone far in that respect. We do that in stream gauging and topographical surveys. We have also appropriated $50,000 to match a like amount appropriated by the Federal Government for a survey of the Des Chutes River territory. That has been very specifically done.

The ACTING CHAIRMAN. That is, with a view to starting the irrigation project?

Mr. HINKLE. Yes; to determine what are and what are not feasible projects and what might and what might not be considered.

The ACTING CHAIRMAN. But you have not actually jointly entered upon any reclamation work?

Mr. HINKLE. No.

Senator SUTHERLAND. This bill, as I understand it, only seeks to ıave the General Government guarantee the interest? Is that orrect?

Senator JONES. That is correct.

Senator SUTHERLAND. It does not undertake to have the United States guarantee any part of the principal at all?

Senator JONES. No; and not more than 4 per cent interest.

Senator SUTHERLAND. Mr. Hinkle, let me ask you, in line with that nquiry, this question: It was suggested here yesterday that if this ›ill was passed that these bonds would be worth 100 cents on the lollar instead of 60, 70, or 80 cents. Do you think the mere fact that :he Government of the United States guaranteed the interest and did ıot guarantee the payment of the bonds would give a bond which, without the guaranty of the Government, would be worth 60 cents ›n the dollar a value of 100 cents on the dollar?

Mr. HINKLE. Yes. The uniformity of the law has that effect. I lo not think that the Government would ever have to pay a cent of this interest.

Senator SUTHERLAND. I am not asking you that. I am asking as to the increase in the value of the bonds. One argument that was made for this measure was that it would enable the farmers who are nterested in these various enterprises to get 100 cents on the dollar ›f the face value of their bonds instead of 60 or 70 per cent, as is ıow the case.

Mr. HINKLE. Yes.

Senator SUTHERLAND. Now, if the property of the district must ›e looked to alone to pay the principal of the bonds, will not the ›ond purchaser look to that, as he does now, for his payment?

Mr. HINKLE. Well, the trouble is, as stated by Mr. Rice yesterday, hat the first few years of development of any reclamation work, whether it be arid lands or swamp lands, the pioneer period has to ›e gone through. Following that, our experience shows that within ı few years the lands and property within the district increase very rapidly. For instance, several projects that I know of within five /ears' time have increased their assessed valuation seven times. One rrigation district in Idaho in its eleventh year has an assessed valua- ion of the property within the district just seven times the amount ›f its outstanding indebtedness.

Senator SUTHERLAND. Yes; but, on the other hand, a good many of :he enterprises have failed entirely, have they not, and been unable ›o liquidate their bonded indebtedness?

Mr. HINKLE. I do not know of any failures in the irrigation dis- rict lines. The failures that I know of are Carey Act propositions.

Senator WORKS. I know of several of them.

Mr. HINKLE. Earlier, though; in the early periods.

Senator WORKS. Of course the law has been changed since then, ›o that they might be self-sustaining now; but they have failed in several instances in California. Do you know of any of the State rrigation districts where the rate of interest on the bonds is as low ıs 4 per cent?

Mr. HINKLE. No; I do not.

Senator WORKS. It seems to me you are fixing a pretty low rate ›f interest for bonds of that kind.

Senator SUTHERLAND. The lowest interest I know anything about is 5 per cent on some of those California projects—5 per cent or 6 per cent usually.

Mr. HINKLE. I think the strongest point for this bill is the matter of uniformity—having some central head for supervision over these plants, separating the sheep from the goats.

Senator SUTHERLAND. Now, Mr. Hinkle, let me ask you right here: Why should this burden be put upon the Federal Government, which is already taxed to the utmost to deal with the problems that it now has? Why should not the burden be borne by the individual State, which is close to its own problems and understands them, instead of saddling it on the Federal Government?

Mr. HINKLE. The individual unit, the legal subdivision of the State, the irrigation district, does carry the whole load. The mere guarantee of the interest on the irrigation district bonds by the Federal Government results only in a proper investigation being conducted by the Government through its Reclamation Service.

Senator SUTHERLAND. Why do you not have your own State do that? Why could not your own State inspect the project and guarantee the interest payment? Let me ask you this: If the Government is obliged to pay any of this interest hereafter—and if we pass a law we must always look forward to the possibilities of the Federal Government being called upon to redeem its guarantee—then proportionately the State of Rhode Island, which is not interested one particle in it, must contribute to the payment of defaulted bonds in Oregon and Washington, for instance. Now, is that altogether fair?

Mr. HINKLE. Well, that is fair if the Government made the mistake that would bring about such a condition.

Senator SUTHERLAND. Well, you admit there is a possibility?

Mr. HINKLE. Well, very remote.

Senator WORKS. It seems to me it would be rather a singular proposition that the Government should guarantee the payment of the interest on these bonds when everything connected with these corporations, including the use of the water, the rates that may be charged, and everything else, is in the exclusive power and jurisdiction of the States.

Mr. HINKLE. I only wanted to say a few words. Judge King is here and I would like to know the position of the Reclamation Service in regard to this matter. Many of these questions that you are asking me I would very much prefer that you would ask him. If you will excuse me, I will give place to him.

Senator SUTHERLAND. To my mind these are very important questions and I would like to have your answer to some of them.

Mr. LAURGAARD. I can answer one question that was asked Mr. Hinkle in regard to the failure of district projects. The only district projects that have failed in the West are those that contained too much Government land so that the assessments could not be collected.

Senator WORKS. That is not so in my State.

Mr. LAURGAARD. As to the early ones in California the law was defective, but I mean in States that have laws that are up to date and practical and on which the water is actually brought to the land.

Senator WALSH. Senator, there must be some official reports on *this proposition somewhere.*

Senator WORKS. Yes; I think these failures were under a different law. The law has been strengthened since then and I do not know of any failures of late. There was no excuse really for these failures except the inefficiency of the law and mismanagement more than anything else, because some of the irrigation districts that I know of are situated in sections of the State where they should have been successful. In some cases they failed to get the necessary water supply.

Senator SUTHERLAND. Quite recently you had in California a very thoroughgoing investigation by your State board of utilities.

Senator WORKS. Yes, sir.

Senator SUTHERLAND. Looking to a complete reorganization of a number of those enterprises which have turned out rather disastrously?

Senator WORKS. Yes; I am not familiar with the later laws enacted on the subject. I know the law has been changed quite materially.

The ACTING CHAIRMAN. The committee will next hear from Mr. King.

STATEMENT OF MR. WILL R. KING, CHIEF COUNSEL OF THE UNITED STATES RECLAMATION SERVICE.

Mr. KING. I wish to state in this connection that in what I might here say I do not want to be misunderstood as speaking officially. I have never talked with the Secretary of the Interior about this bill, although I have discussed it with some other members of the department. Hence I want it fully understood to begin with that I am not officially speaking for the department or even for the Reclamation Service, but I am pleased to have an opportunity to give my personal views from my experience and observation and study of this question so far as they might be of interest to the committee. It has been some time since I have read the bill under consideration. As I recall it, the purpose of the bill is to secure the payment of the interest upon the bonds of irrigation districts. That appears to be the main purpose. It covers interest at the rate of 4 per cent per annum. I think this is a step in the right direction, although it does not go as far as I would go if it were within my power to determine what should be done. It should go even further than the bill provides and let the Government, after the proper surveys and investigations are made of the proposed irrigation district, to be approved by the Department of the Interior, guarantee both principal and interest, with the understanding, however, that the Government would manage the project until after the major part of the principal and interest is paid, and that some method should be provided whereby there would be a sinking fund from year to year to pay off the principal and interest. But, as I take it, we can get a half a loaf sometimes easier than a whole loaf, and if the interest is guaranteed, say, for 20 years, that comes within five installments of returning to the investor the entire amount invested. If this is guaranteed by the Government, the fact that so much of it is guaranteed by the Government ought to make the bonds sell at par. I will state by way of illustration that there is a certain district in one of the middle arid States which has $2,203,000 in irrigation district bonds at 6 per cent.

Senator WORKS. That is one of the State organizations under the State law?

Mr. KING. Yes; under the State law. The holders of these bonds, through their agents, have already offered that if the Government will take over the management of that district and collect the operation and maintenance fees and handle the district property they will deduct $203,000 from these bonds, making an even $2,000,000, and will take 4 per cent interest—in lieu of 6 per cent provided for in the bonds—to be paid on the same basis as the projects are paid for under the reclamation extension act; that is to say, 2 per cent for the first four years and 4 per cent for the next two or four years, I forget which, and then it increases to 5 per cent or 6 per cent, and then the entire amount is paid. So that the entire amount will be paid in 20 years. That is an illustration of the difference between a Government handled project and a privately handled project. The Government would not have to guarantee the payment; it would merely agree that it would do the best it could toward managing the project. It furnishes a good illustration of the benefits which will accrue to the farmer if the Government is willing to assist in such matters.

Now, in regard to the constitutional feature of it, I have already given an opinion on that subject. I do not know what the outcome of it will be. We have in that project a two-fifths interest in a large canal. The project owes the Reclamation Service $475,000 for surplus water right under the Warren Act. So far as this particular project is concerned, our interest lies in the right of way through this project and the unification of this entire irrigation system, which is in the North Platte Valley, in which something like 100,000 acres are already reclaimed; that is, the works are completed for it and there are under process of construction works that will reclaim another 100,000 acres. Below this district there are about 20,000 acres which are intended to be reclaimed eventually, and for the purpose of unifying the entire system it might be advisable to accept the proposition. Should we do so, I think there could be no doubt about the constitutionality of it.

Senator WORKS. I am asking about purely State organizations, leaving out any question of any interest in the Federal Government by reason of its ownership of the public lands. I am referring to State corporations irrigating private lands. Under what provision of the Constitution could we do this?

Mr. KING. The same question has been asked repeatedly in various forms elsewhere concerning the authority of the United States, through the Reclamation Service, to build projects which included private lands.

Senator WORKS. I think that is a very serious question.

Mr. KING. It is a very serious question. I think it probable that 50 years ago, before the matter was fully understood, the courts would have probably done what they did in those days in regard to riparian rights, when, without regard to the reason for doing so, they adhered to the old common-law doctrine, which had its origin under conditions which were entirely different from those existing in the Western or arid States. They would probably have held it unconstitutional, just as the early decisions adhered to the old doctrine

of riparian rights, which was wholly a misfit in the Western States, and which to the up-to-date lawyer from the West appears ludicrous.

I will say in that connection that the Supreme Court of the United States has held it—the national reclamation law—constitutional in the case of Swigart *v.* Baker, 229 U. S., 187. The matter came up from North Yakima, Wash. The court held that even though there were also private lands in a reclamation project, they might be reclaimed at the same time and with Government lands. In the discussion of that question when it was before the United States Court of Appeals, one of the judges made some observations which at the time were new to me, but perfectly clear and, I think, the reasoning sound, to the effect that while it might be unconstitutional in the State of Maine, for example, should they there attempt to reclaim private lands, yet it would not be unconstitutional in the Western States. There is reason for that. The original 13 States had title to all their land. The Government had no public lands in those States. So it is with the State of Texas. In that State the Government has no public lands, nor has it ever had any in that State. But as to the Pacific Coast States the Government owned the public domain. The Government accordingly owned all the water within the public domain—right to the use of the water—just as a man might own a spring that rises on his homestead and does not flow off the homestead. Some question might arise in that connection where the water flowed into the State of Texas, or something like that, but where the entire stream is on the public domain the Government owned it, or the exclusive right to the use of it.

Now, then, following that up further, the unappropriated waters, wherever they may be found, whether in the State or elsewhere, are subject to appropriation.

There are two views taken at the present time. One is that the State has the absolute control. But whichever view may be taken, the Government has at least a certain interest in the unappropriated waters of the public domain. The act of 1866 was the first to recognize the right to appropriate the unappropriated waters. The act of 1877 followed this up. As it stands now, authority is given by the act of Congress to appropriate the unappropriated waters of the public domain, so far as the Government is concerned.

Senator WORKS. I suppose that right exists because the Government is the owner of the land?

Mr. KING. I am leading up to the constitutionality of this question. Now, it is true that wherever any water can be appropriated by the organization of an irrigation district the Government has at least some interest in it, and any step which the Government can take looking toward the appropriation of these waters and applying them in the reclamation of the public lands, even though it is necessary to reclaim some private lands, must, under the rule laid down by the Supreme Court of the United States in the case of Swigart *v.* Baker, 229 U. S., 187, and also by the court of appeals, be held constitutional. The Orland project in California is an example of it. There is a proposed project in Oklahoma that is in a similar position. There is perhaps about 1 per cent of the land that is public land in each project. I looked it up and wrote an opinion to the Secretary of the Interior, holding that it would be constitutional to build a

project there with Government funds, even though all the lands to be reclaimed may be in private ownership.

Senator WORKS. What State are you from?

Mr. KING. I am from Oregon. I was born in Washington Territory but have lived in Oregon 44 years. Oregon started out by upholding the riparian rights doctrine, following the common law, but has finally gotten around to the doctrine of prior appropriation, overtaking the States of Utah, Colorado, and others which hold to that doctrine. (See Caviness *v.* La Grande Irr. Co., 119 Pac., 731.)

Senator SUTHERLAND. This bill applies to other States than those in which the Government has public lands. It provides for draining, reclamation, and diking. It applies not only to irrigation projects but to drainage projects as well. Those projects might be undertaken in Ohio or any other State.

Mr. KING. Well, that might possibly be held unconstitutional in some of the original 13 States where the public land laws did not apply. I think we are progressing rapidly enough. The Constitution of the United States is largely a matter of growth. The reasons which might have given rise to a decision 50 years ago might not exist to-day. We must always consider the conditions existing when the courts reach them. The reason and spirit of the Constitution can not, at least should not, be disregarded. Changed conditions of the present time make laws constitutional which were unconstitutional decades ago. It is a matter of growth. Of course, Senator, in law it is a good deal like the saying in our Western States to the effect that when it comes to judging of what is in a mine "one man can see as far into the earth as another." So it is, to a limited extent, regarding the law, or what the courts may hold. One good lawyer can anticipate what the courts will hold about as well as another. I am only giving my personal views, but I do not hesitate to say unqualifiedly that I think the courts will hold the proposed law constitutional. However, that is merely a prophecy. It is only my personal opinion as a lawyer. At any rate, it strikes me that the doubt might be resolved in favor of it. Merely because it may be unconstitutional in the Eastern States it would not necessarily effect the status of it in the States where we need it the most. A previous act of Congress has in effect declared the arid States to be those west of the one-hundredth meridian. This should carry great weight. It discloses a special policy of the Government which is now being recognized, and before I conclude my remarks I hope to be able to show that while there might be some question concerning the power of the Government under the Constitution to follow the plans intended by this bill east of the one-hundredth meridian—although I do not concede that—yet there should be no question concerning the arid States west of the one-hundredth meridian unless the recognized law and special policy of Congress, as disclosed by legislation heretofore enacted, including the implied recognition of these rights by the courts, are to be disregarded.

Senator WORKS. I understand an investigation has been made, or is being made, by a commission appointed by the Secretary of the Interior from the Reclamation Service of the conditions of the different reclamation projects. Has that report been made yet?

Mr. KING. There has been no report made. It was considered *nformally by a* few of us as to the best method of raising revenue

for the purpose of reclaiming the arid lands, but no definite report has been made.

Senator WORKS. I understand that Prof. Mead was on that commission. It was expected that the report would be made in the early part of the year. Do you know whether it has been made?

Mr. KING. I have not heard of that. There is no report made by Mr. Mead. Mr. Mead has reported on the question of rural credits, but nothing on this other feature.

Senator WORKS. I understand from Prof. Mead himself that he and some other gentleman from New Mexico, I have forgotten his name, had been appointed to make a thorough investigation of all these reclamation projects, and to report the result of their investigations. I had a letter from him not long ago in which he said, I think, that the report would be filed soon.

Mr. KING. Dr. Elwood Mead, Brig. Gen. Wm. L. Marshall, and Supervisor of Irrigation I. D. O'Donnell, were appointed a committee of three to look into the expenses of these projects and make a report on what should be charged up as expenses of those projects. It is possible that you have this confused with that report you have in mind.

Senator SUTHERLAND. Have you ever undertaken any project in Texas?

Mr. KING. We have what we call a project along the Franklin Canal, which is in Texas. It is a part of the Elephant-Butte project.

Senator SUTHERLAND. There are no public lands in Texas?

Mr. KING. No; there are no public lands in Texas, but there is an act authorizing the construction of reclamation projects in Texas, whether the lands to be reclaimed are all private lands irrespective of reclamation of Government lands in same project in other and adjacent States.

Senator SUTHERLAND. I know there is.

Mr. KING. But so far the only project that has been in operation or being constructed, is in connection with the Las Cruces section of the country, and by taking in the Texas end of it, it very materially reduces the cost of the entire project.

Senator SUTHERLAND. That is, it is united with a public-land project?

Mr. KING. Yes; it is united with a public-land project, and on that theory no question has arisen regarding the constitutionality of the law, though it might arise if we attempted to reclaim all private lands.

Senator WORKS. How far has the Orland project been completed?

Mr. KING. That has been completed. It is one of the most successful projects we have. It is a small project.

Senator WALSH. Judge King, I confess I have not been able to follow the course of your reasoning.

Mr. KING. I am not surprised, Senator——

Senator WALSH. I do not refer to accepting your conclusions at all, but I confess my inability to follow your line of reasoning. The line of reasoning by which you arrive at the conclusion that the Government may undertake the reclamation of the lands in one of the Western States, all of the lands being held in private ownership. As I gather it, you lay down the proposition in the first place, that the Government, by the acquisition of title to the territory in the case

of the Louisiana purchase east of the mountains, and the treaty with Mexico, and the settlement of lands in the west, became the owner of all the lands which had not been privately appropriated, and that as the owner of the lands it also became the owner of the water and remained the owner of the land and water during the territorial days.

Mr. KING. Except such as was appropriated.

Senator WALSH. Yes. But it conveyed away in a certain area all of the lands and the States were all admitted to the Union, by which, if the prevailing theory is correct—and that, I think, is entertained by the members of the committee generally—the States became the controlling factor in respect to the waters of the streams. Now, just how do you follow that course of reasoning?

Mr. KING. Well, in one respect you misunderstand me. I was not expressing an opinion as to whether the State or the Government was the owner of the waters. There can be no question but that in the beginning the Government was the owner of all the public lands in the West and the water on and appurtenant to the land. I made an exception regarding a right that Texas might have when it was admitted into the Union, which was with the understanding that it owned all its lands and the water was a necessary appurtenant to the land. I want to make myself clear if I can. I regret that I have not read for some months the case of Swigart *v.* Baker, and other cases which I will cite later, but the first distinction is that one is an arid section of the Nation and the other is not. Different reasons would apply in one instance from what might apply in another.

Senator WALSH. But I want to confine you to the reasons——

Mr. KING (interposing). But you asked me how I got the distinction.

Senator WALSH. Oh, no; accept the distinction.

Mr. KING. You asked me for my reasons.

Senator WALSH. Now, we will go into the favored region, the West. Now, we have progressed that far. I follow you to that extent. What is the next step?

Mr. KING. Unless you let me answer in my own way I am afraid I will not be able to make myself clear.

Senator WALSH. All right, Judge; go on.

Mr. KING. I think there is not much doubt but that so far as the original 13 States are concerned the Supreme Court of the United States will hold that the doctrine of riparian rights is in full force and effect. Possibly it would be modified to some extent. There is a reason for holding that it is in full force and effect in those States that does not exist in the arid States. First, the Government has no public lands there. It was not a country that required irrigation. In the Western States the Government owned the public lands, and it is reasonable to presume that since it owned the water with the lands it had the authority to require some method by which those lands could be made productive.

Now, in order to do that, irrigation became a necessity. The right of appropriating water for the beneficial use in irrigation followed the land. But in the Eastern States the reason for the rule did not exist. These lands have passed into private ownership, and they

still require irrigation, which condition does not exist in the Eastern States. The rule which has grown up in the arid States is such that the Government has recognized by a number of decisions, including recent ones, the doctrine of prior appropriation, and the right to irrigate these lands.

The act of 1877 dedicated to the public the right to appropriate the unappropriated waters and specified that it should be done under the doctrine of prior appropriation. The Oregon Supreme Court held—I happen to have had the honor of being on the bench at the time and wrote the opinion—that since the date of the desert land act (1877) all lands taken up since that time come within the doctrine of prior appropriation.

Senator WALSH. I remember the case very well.

Mr. KING. The Supreme Court of Washington, I find, has held to the contrary rule, but in passing upon the case it did not give any reasons for its conclusions. Possibly that is on the theory that it is easy to give a conclusion, while it may be very difficult to give the reasons upon which the conclusion may be based. However, the Supreme Court of the United States, in Boquillas, etc., Co. *v.* Curtis, 213 U. S., 339, has impliedly approved the conclusion reached in Hough *v.* Porter, 151 Oreg., 318; 95 Pac., 732; 98 Pac., 1083; 102 Pac., 728, 731, to which I have just referred. At least they extend the compliment of saying that the holding there made was on "plausible grounds."

The decision in Burley *v.* United States, 179 Fed., 1, held, in effect, that there was a distinction between the law applicable to the far Eastern States and those of the West, due to climatic conditions, including the act of Congress which recognized the arid section as being west of the one hundredth meridian. It would seem therefore that whatever might be held respecting the Eastern States would not necessarily be taken as a precedent for any action which Congress might take respecting the country west of the one hundredth meridian.

Senator SUTHERLAND. The rule to which you refer, regarding appropriations, is one that arose under State laws, State decisions, and State customs, and not under any laws, decisions, or customs of the United States.

Mr. KING. Well, except so far as the act of 1866 and the act of 1877 are concerned.

Senator SUTHERLAND. Well, they recognize——

Mr. KING (interposing). Yes; they recognize the State laws.

Senator SUTHERLAND. They expressly recognize State customs and local laws.

Mr. KING. I think there is considerable confusion along these lines as to whether the State or the Government owns the water, or use of the water. About all there is to it is that the State has the right to enact such laws as may be reasonably necessary for the appropriation of water, and whether the Government makes the appropriation for irrigation purposes or anyone else, it might be held that the Government should comply with the local customs, rules, and regulations of the State, the same as anyone else.

Senator SUTHERLAND. But it is a matter that the State controls.

Mr. KING. Yes; the State controls it in that way, but so far as the State or the Government owning the water is concerned, it is for all practical purposes a "distinction without a difference."

Take, for instance, our mining laws. While in the early history of this matter the Supreme Court of California held that the State owned all the minerals, probably relying on that, we went from 1848 to 1866 before any mining acts were passed, but finally the matter was determined otherwise, and the California cases on this feature were overruled. Congress has jurisdiction over the mining lands, yet the courts have held that the State can make reasonable rules relating to the location of mining claims. Now, it may be that the States can make reasonable rules and regulations regarding water rights, including the water not appropriated. Yet, under any view, the public has a right to appropriate that water, and whoever is first in time is first in right, except, of course, as modified by local law.

Senator SUTHERLAND. Now, Mr. King, the doctrine that the rule of riparian rights has been abrogated and has been entirely superseded by the rule that appropriation for beneficial use is a measure of right, applies in its strictness in the Rocky Mountain States?

Mr. KING. Yes, sir.

Senator SUTHERLAND. And the General Government recognized that as a rule. Now, if Oregon were to lay down a different rule and hold to the old doctrine of riparian rights, have you any doubt that the Congress of the United States would be obliged to acquiesce in that?

Mr. KING. Well, that would depend——

Senator SUTHERLAND (interposing). Or in other words, could the Government of the United States ignore the rule laid down by the State and put in place of it by any sort of proceeding, by legislation or otherwise, the rule which obtains in the Rocky Mountain States?

Mr. KING. I think that under some conditions it could. It could where the stream flows from one State to another. Whether the court would have the constitutional authority to override the decision of the State supreme court where the property is entirely within the State is another question. But as to an interstate stream, I think the Supreme Court of the United States would have full jurisdiction. In fact, if it were not an interstate stream, I can see how the question of taking property without due process of law might be urged and enable the United States courts to take jurisdiction. The question of riparian rights involves a question which has grown out of grants made by the Government, and if the question of taking property without due process of law is involved and can be presented, then, certainly the United States Supreme Court could decide the same in accordance with its views of the law upon the subject. A question of this kind was recently raised in the case of Moss *v.* Ramey, 239 U. S., recently argued and decided. Another question involving rights of this character is now pending before the United States Supreme Court in the case of Pacific Live Stock Co. *v.* Lewis et al. I participated in the argument of both of these cases. The first case mentioned involved a question of riparian rights in Idaho, and a number of decisions rendered by the highest court of that State were overruled.

Senator WORKS. Well, the doctrine of prior appropriation as against riparian rights is not the result of any Federal decision. It *entirely a matter* that has been controlled by the States.

Mr. KING. I do not agree with you there. I think it is a result of the acts of 1866 and 1877, which recognized and declared as the law that they had the right to appropriate under the doctrine of prior appropriation. In the first place there was no law on the subject. The people, by local customs, rules, and regulations, made the laws as they went along.

Senator WORKS. That applies to the conditions as they are made by State legislatures.

Mr. KING. Well, that is a matter of opinion.

Senator WALSH. You regard it in the nature of a grant from the Government of the United States to anyone who might take advantage of the grant?

Mr. KING. Yes, sir; this is practically a quitclaim deed.

Senator WALSH. Well, that is a serious question.

Mr. KING. A very serious question.

Senator WALSH. As to whether this is a quitclaim, the Government releasing any right that it might possibly have, or whether it is a grant, the Government granting something which it has in fact.

Mr. KING. If you will permit me to coin a word, I will say it is a quasi dedication.

Senator WALSH. Well, that contemplates the ownership in the dedicator.

Mr. KING. It does; and the one who makes the appropriation acquires the vested right.

Senator WALSH. We are all very anxious to promote the purpose that these gentlemen have in mind and we are all interested in putting these enterprises on a financial basis if we can. We are likewise desirous, if we should conclude to report the bill, to put ourselves in the position where we could support it on the floor of the Senate. Obviously, this objection will first address itself to the mind of any man who has the slightest disposition to antagonize the measure.

Now, you will pardon me, but I would like to follow the line of reasoning that you pursue a little further, because we will have to rely upon you very largely if we indorse this measure. It seems to me that you dropped the argument at the very beginning of it. Now, we all follow you easily enough that there is a vast difference between the Eastern States and the Western States in relation to these matters, and there is a difference between California and the rest of our Western States. Originally your State stood with California, as Washington did, in holding that the grantee from the Government took a riparian right with his grant, and is entitled to have the stream flow down past his premises as it was wont to flow, as against anybody who made a subsequent appropriation. As against anybody who made a prior appropriation, he took it subject to that charge, and the Supreme Court of the United States recognized that. It says that the Government is the owner of the land in these States just the same as a private owner is, and the Government can not insist any more than a private owner shall insist that the water shall flow down past his premises as it was wont to flow; that the Government land is subject to the same rule. It may be deprived of the water the same as a private proprietor might be deprived of the water. We follow you that far. That is easy. But now we reach

the important question. Here are lands held purely in private ownership. The Government does not own an acre that is to be irrigated. The water is going to be appropriated from the stream to irrigate it. Even if we concede an ownership in the water of the stream, free permission is given to take that water. Anybody who wants to take it may take it. That is the act of 1877.

Mr. KING. Do you mean to say that before anyone takes it the Government must have lost all interest in it? Has not the Government the same right to appropriate that water for any of its public purposes?

Senator WALSH. Undoubtedly.

Mr. KING. I just wanted to get your position. Undoubtedly the Government has the right under the State statute just the same as any other appropriator. Whether it would have the right outside of that, we need not discuss now.

My theory is this: That until that water is appropriated, until it is taken, the Government has the first control over it. The Government has merely dedicated to the people the right to go and take it just like you take your public lands. When a man "squats" on a homestead he acquires a certain right, and it is a vested right, as against all except the United States, but until that land is filed upon the Government can do as it pleases with it.

Senator WALSH. Of course.

Mr. KING. I think the same rule applies to the water. Practically all of the laws on the subject recognize the right of the State to make reasonable local rules, laws, and regulations regarding the appropriation of water.

Senator WALSH. You have illustrated your position very nicely in the Supreme Court case.

Senator WORKS. Senator Walsh, you say the Government has the right to appropriate the water of the streams. Undoubtedly it has for the purpose of its own lands.

Senator WALSH. Exactly.

Senator WORKS. But has the Government a right to appropriate the water of the streams for the purpose of applying it to other people's land?

Senator WALSH. Well, the individual has that right. I might take water out of a stream for the purpose of putting it on your land. That is the general rule out West. You do not have to own the land on which you put the water, if you put it to a beneficial use. But we are getting away from the question.

Senator WORKS. I want to stick to that a little bit longer. The question is whether or not the Government has the right to enter into the business of selling water to other people.

Senator WALSH. That is what I want to lead Judge King into.

Mr. KING. That has been determined by the case of Swigart *v.* Baker to which I have referred, in which it was held that the Government does have that right.

Senator WALSH. But that case only determined that where there is both Government land and private land——

Mr. KING (interposing). I will admit that the decision——

Senator WALSH (interposing). I am not talking about the decision. *The Government* has the right undoubtedly to improve its own *lands. It follows* necessarily that as it carries the water to private

lands as well, it may make a provision by which the private lands shall contribute measurably to the project. That is easy.

Senator SUTHERLAND. That is a mere incident.

Senator WALSH. That is simple. But we are taking the case now where the Government does not own an acre of the land. I want to follow your argument on this riparian rights doctrine as opposed to the doctrine of prior appropriation. We concede the right of appropriation. Any owner of land may appropriate water and take it out and put it on the irrigated lands. How do you follow from that to the conclusion that the Government could take out water from a stream and spend the public money in putting that water upon the land of private owners, exclusively private owners? That is where I can not follow you.

Mr. KING. Well, if I may be permitted to do so, I would like to insert in this proceeding opinions which I prepared for the Secretary of the Interior on that particular point.

Senator WALSH. I am very sure it would be most helpful to the committee.

(The opinions referred to will be found printed in full on page 58.)

It has been some time since I got right down to the bedrock and worked the question out, but I will say that I reached my conclusion without any serious doubts as to the constitutional feature of it. As I stated before, it is a good deal like a mine. One man can see as far into the earth as another man. We can not say what the court would hold. The general public good and general welfare of the community and the State necessarily enter into it to some degree. All I can do is tell you what I would hold if I were the court.

But I recognize that the public good, etc., is not necessarily the test. However, this question enters into it; when the Government conveyed the public lands to the citizens of the State, while there was no express agreement to help reclaim those lands, I can see where it might be held that there was an implied right to do so—I will not say obligation—to assist the citizens who settled on these arid sections in reclaiming the lands which the Government once owned. Now, I have not seen any decision to that effect. That is just an idea that passed through my mind while you were talking. I think you will find after thorough investigation that good authority exists for holding it constitutional. Quite a number of these matters I reasoned out as best I could in Hough *v.* Porter. If you can take the time and patience to read it, I would like to talk with you after you have read it.

Senator WALSH. I have it in mind pretty well

Mr. KING. It is such a lengthy opinion that I think it would be cruelty to Senators to ask them to read all of it. However, the reasoning there will to some extent meet questions you and Senator Works have asked.

Senator SUTHERLAND. Judge, do you think the Federal Government would have the power to provide for a system of waterworks, to build a system of waterworks, to furnish water to a town built on the public domain?

Mr. KING. I believe it would, if it is on the public domain.

Senator SUTHERLAND. I mean on land formerly on the public domain, but which has passed into private ownership.

Mr. KING. Well, there might be some question about it. I do not think that is in point, however.

Senator SUTHERLAND. What difference is there in principle between that and the case in which it is undertaken to furnish water to farmers who own land which has formerly been a part of the public domain?

Mr. KING. Well, that is getting down to a fine point—quite technical, Senator.

Senator SUTHERLAND. It is a difference between farm lands and town lots.

Mr. KING. Well, one is quenching the individual's thirst and the other is quenching the thirst of lands the title to which the Government has once owned but parted with.

Senator SUTHERLAND. There is just as much constitutional power for reclaiming a man's thirst as for reclaiming his land.

Mr. KING. I will not say that the Government has not that power, but I can see where it could be held constitutional in one case and unconstitutional in another case. Now, the Government, in building the reclamation projects, in one respect is acting in the nature of an agent for the settler for the reclamation of this land. I can see where there might be a distinction between the right of the Government to take water for supplying a fort, a military hospital, as in New Mexico, for example, or a military reservation, where riparian rights might be held still in force, notwithstanding these later acts; but as to a body of citizens, for whom a project may be built, I think the Government is acting in the capacity of an agent. To coin a word to meet the new conditions, it becomes a quasi agent under such circumstances. The Government furnishes the money and says, "We will hold the title to this property until you pay the major part thereof."

Now, it is getting late. I want to say one thing more about the general proposition of guaranteeing interest on bonds. I believe that if it should be found constitutional, which I think it is, for the Government to proceed thus far, that it offers a solution for the reclamation of all the arid lands of the West without Congress appropriating a dollar for the purpose and without taking any material chances upon the returns, provided it is safeguarded with the necessary provision regarding the building of projects in the first instance in having Government engineers ascertain first whether it is feasible and making certain that it is a feasible project. I would not be in favor of the Government guaranteeing interest on bonds on any irrigation district unless after a thorough investigation by its agents or engineers of the project it is pronounced feasible in advance. If that is done, I can see how all the arid lands may be reclaimed, to the extent of the available water, without making an appropriation for the purpose, for the reason that each project would build itself up on a sound basis.

That is all I have to say. If the Senator over there (Senator Walsh) does not get me into any more legal boxes, I will be fortunate.

Senator WORKS. I think you will have some trouble to get out of the box that the Senator has already got you in.

Mr. KING. I am not prepared to admit that I am in a box as yet. *If we did not have* the Swigart-Baker case and other good cases to

back us up as to the implied constitutionality of the reclamation act, and laws of this nature, I would not feel so confident as I am.

Senator WORKS. What volume is that case in?

Mr. KING. I will find out and put it in the record.

(The case above referred to is reported in 229 U. S., 187.)

Senator SUTHERLAND. Did they hold any more in that case than that, having the power to reclaim the public lands of the United States, there went with it the power, as wholly incident, to reclaim private lands forming part of the project?

Mr. KING. I think that is probably as far as it went. Practically every constitutional question was raised in connection with that case, and the court of appeals in that and other cases to which I will cite you to-morrow, had more to say on these other features than the Supreme Court of the United States. Their opinions covered the points essential to the final determination of the case. In these cases there were both private and public lands involved. The decisions of the court of appeals on these particular questions might be dicta so far as the private lands are concerned, but in any event they are very persuasive and the reasons, I think, are sound.

Senator SUTHERLAND. In the case of Kansas *v.* Colorado, I think the court said very clearly that Congress had no independent power to provide irrigation for arid lands or to reclaim arid lands, but only to reclaim lands of the Government.

Mr. KING. You can take that decision and read it and you can find plenty of support for either side of the question.

Senator WORKS. As I understand it, the question there was whether or not the Government had such interest as to be admitted as a party.

Mr. KING. That was in the first opinion, but in the second opinion they went into the merits of the case.

(Thereupon at 11:55 a. m., the committee adjourned to meet at 10.30 o'clock a. m., to-morrow, Thursday, March 30, 1916.)

GOVERNMENT AID THROUGH DISTRICT ORGANIZATIONS.

THURSDAY, MARCH 30, 1916.

UNITED STATES SENATE,
COMMITTEE ON IRRIGATION AND
RECLAMATION OF ARID LANDS,
Washington, D. C.

The committee met at 10.45 o'clock a. m., in room 129, Senate Office Building, pursuant to adjournment, Senator Harry Lane presiding.

Present: Senators Lane (acting chairman), Thompson, Walsh, Works, and Jones.

Also present: Mr. Will R. King, Mr. George M. Corlett, and Hon. James H. Hawley.

The committee resumed the consideration of the bill (S. 1922) relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor.

The ACTING CHAIRMAN. Mr. King, you may proceed.

STATEMENT OF MR. WILL R. KING, CHIEF COUNSEL OF THE UNITED STATES RECLAMATION SERVICE—Resumed.

Mr. KING. Mr. Chairman and gentlemen, if there is no objection, I would like to take up a little more of your time in completing what I had to say yesterday, with which at the time I thought I was through. But after thinking over a number of the questions that were propounded to me on the legal problems—some of which are very intricate constitutional questions—I feel that I ought to say a few words more on the subject. At the outset, of course, as every lawyer knows, there were serious doubts as to whether the Supreme Court of the United States could even determine the constitutionality of the measures which Congress might pass. However, after a series of years and threatened impeachment of a Justice or two it was finally determined, and I think rightly, that the Supreme Court of the United States had the power to pass upon those questions and determine the constitutionality of an act of Congress.

This bill, as I take it, so far as the constitutional features are concerned, goes to the question of the authority of the United States to guarantee the interest upon irrigation district bonds.

Congress has heretofore established precedents along that line, so I am informed, but I have not looked up the records. I am reliably informed, however, that Congress has established a precedent in that direction, especially in the case of guaranteeing certain bonds issued by the Union Pacific Railroad Co., the payment of either the

interest or the principal, or both, I am not certain which; but, in any event, it constitutes a precedent along that line, so far as Congress might have passed upon the constitutional question.

Senator WORKS. Has that action of Congress ever been tested directly in the courts—do you know, Judge?

Mr. KING. My impression is that it has not been. I only refer to it as a matter of congressional history. This morning one of the parties in my office, who claims to know about it, said it had been tested in the courts, while another party thought not. I have not had the time to look it up. That was merely a matter of difference of opinion. I understand that one of the Federal courts upheld it, but probably it did not reach the Supreme Court of the United States.

Senator WORKS. The payment of interest on the bonds, I suppose, would involve a question of interstate commerce, and it might be justified on that ground.

Senator JONES. And possibly the establishment of post roads.

Mr. KING. Yes; there may be a number of questions involved. I only mention it as an instance of the guaranteeing of the payment on bonds. I hesitate to do that, because it did not result very favorably, so far as the Government was concerned. As I understand it, the Government lost some money on it. Looking into the question hurriedly, I think we should take into consideration the fact that there is no provision in the Federal Constitution for the establishment of national banks, and yet the Government will authorize the establishment of these banks and will authorize the loaning of money by the banks to the people, under certain restrictions and regulations. That itself is going a long ways in the direction of the question now before this committee.

In this connection permit me to call your attention to a discussion of the constitutionality of that feature in the case of McCulloch *v.* State of Maryland, reported in Fourth Wheaton, page 415, where, I think, the question was first determined by the Supreme Court of the United States. At that time, as I remember from reading the history of the subject, it was a much greater jar to the public sentiment, especially so far as the lawyers were concerned, as to whether the banking acts were constitutional than the question involved in the bill now before Congress and under consideration here, or of the question of the constitutionality of the reclamation act as applied to private lands. Even one of the Presidents, as I recall it, took the position that the banking act was unconstitutional, and a great deal of disturbance was created over it.

Before giving the quotation which I have in mind, I will refer to a certain provision of the Constitution, section 3, which reads——

Senator JONES (interposing). What article?

Mr. KING. Article 4, section 3, which reads:

> Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *.

That section does not say anything about the question of irrigating private lands or anything of that kind, but it says equally as much about it as it says about the authority to create banks and loaning of *money through the* banking corporations, or the establishment of

rural credits, and many other questions which are constantly coming up. Of course, the matter of irrigation was never dreamed of when the Constitution was adopted. The problem was more to get rid of the water than to get it.

In reading the opinion of Mr. Justice Marshall, who is recognized as among the greatest of constitutional authorities, I find this remark:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited—

Note those words—

> which are not prohibited, but consistent with the letter and the spirit of the Constitution, are constitutional.

One of our hobbies in legal matters is the question as to the "letter and spirit" of the law, which I think tides us over many difficult problems on the question of the constitutionality of an act. In my six years' experience in the State legislature—two years in the house and four years in the senate—I discovered that I was inclined to be like a good many others, that is to say, if I was in favor of a bill I did not have very much difficulty in finding out whether it was constitutional, and if I were opposed to it I quickly became interested in the constitutionality of the act. I became, like other lawmakers, under like circumstances, very jealous of and much concerned about the constitutional rights of my constituents.

Now, it may be that I am a little biased because I am inclined to favor legislation along this line. Hence you may, of course, take this into consideration.

In discussing this question I will only give you excerpts from this decision. For instance, Judge Marshall says:

> Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States respectively or to the people"; thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one Government or prohibited to the other to depend on a fair construction of the whole instrument.

I call particular attention to the fact that nothing is said regarding the power to create a banking corporation, and especially to this expression: "But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers."

Senator WORKS. Now, in that connection, Judge, suppose that the foundation of the right is something over which the Government has jurisdiction and was incidentally brought in by reason of that fact. And suppose we applied that to the question of rendering aid to purely State corporations and supplying water to private individuals. Where do you find your information to bring you within that decision?

Mr. KING. I am coming to that later. I think I can give you my theory of it, at least. I will endeavor to make myself clear on that point.

Senator WORKS. That is the point I would like to have you discuss.

Mr. KING. I fully understand where the difficulty lies, and I am leading up to it. Since we have no decision directly on this point, of course, you will understand that we have to reason it out and form some basis for reaching our conclusion, and I am endeavoring to do that.

I am not unmindful of the rule, as announced by such eminent text writers and jurists as Judge Cooley in his work on constitutional limitations, seventh edition, page 241, the substance of which is that the Government of the United States is one of enumerated powers while the governments of the States are possessed of general powers of legislation. When a State law is assailed on the ground of its unconstitutionality we examine the constitution to ascertain whether there is a clear prohibition of the act complained of; that is to say, so far as the State constitution is concerned the act is presumed to be valid unless we are able to discover that it is prohibited; while in the Constitution of the United States we look for grants of legislative power and it is well settled that Congress can pass no laws that are not authorized by the Constitution, either expressly or impliedly. A State legislature has jurisdiction of all subjects upon which its legislation is not prohibited.

In this connection do not overlook the statement that Congress has the power to pass laws which are impliedly granted by the Constitution and that this word "impliedly"—or incidental—is the pivot upon which Mr. Justice Marshall decided the case of McCulloch *v.* Maryland, in favor of the constitutionality of the banking act.

Notwithstanding, however, the distinction between the construction of the constitution of a State and that of the United States, it seems equally well settled that the object and purpose of a law, whether fundamental or otherwise, must be considered, and that a constitution, whether National or State, must not be interpreted upon narrow or technical principles, but on broad general lines, in order that the objects and purpose of the law may be carried out. The whole constitution must be construed together, and whether a State or National Constitution, when two constructions are possible, one of which tends to impede or defeat the very purpose of the Government while the other construction does not, we should take into consideration the interpretation which harmonizes the Constitution as a whole and carries out the purpose for which such Constitution may have been adopted. This feature appears to have been well considered in State *v.* Cochran, 55 Oreg., 179; 105 Pac., 884, in which the constitutionality of the appointment of two additional supreme judges authorized by the Oregon Legislature, was brought in question.

Article 1, section 8, of the Constitution expressly gives to Congress the power to borrow money on the credit of the United States and the power is given to dispose of the territory or other property of the United States. There seems to be no limit to the variety of purposes for which Congress may appropriate money, except the prohibition in the fourteenth amendment against assumption or payment of any debt or obligation in aid of insurrection or rebellion against the United States or any claim for the loss or emancipation of any slave. The prohibition thus expressed was necessary only on the assumption, and it might be said should be taken

construction by the people of the Constitution, to the effect that without such prohibition Congress had the power to assume or pay such debts or obligations as were there enumerated. The prohibition against paying this particular class of debts would clearly seem to imply that Congress had the power either to pay or guarantee the payment of such debts as were not there enumerated. Then how can it be reasoned out that Congress does not have the right if it deems proper to do so to appropriate for or guarantee the obligations of a public corporation recognized as being for public use and public purposes, a class of corporations which are held in some States to be municipal corporations and in other States quasi municipal corporations.

When I am asked to point out in the Constitution the provision wherein Congress is authorized to guarantee the interest on irrigation district bonds I do not hesitate to answer that there is no express provision, but as in the Maryland bank case there is certainly an implied right, to say nothing of the other reasons which I have just advanced. For example, we find no express constitutional authority for purchasing territory from foreign powers, yet the Louisiana and Alaska purchases were made. There is no express constitutional authority for the payment of pensions, yet very early in the history of the country Congress appropriated money for this purpose. These payments are made to widows of soldiers as well as to the ex-soldiers themselves and are purely personal gratuities. It is authorized, I think, more largely upon the ground of implied authority in Congress than upon any other ground that might be advanced.

We have no express authority in the Constitution for levying duties upon imports from countries under the general charge and control of the United States, such as the Philippines and at one time Cuba, etc., yet this was upheld by the Supreme Court of the United States—although by a divided court—upon the implied authority of a nation to carry out the general purposes for which the Government was organized and which were not foreseen at the time of the adoption of the Constitution. It has been some time since I read that decision, but as I remember it there was also included in the reasoning that this territory was not a part of this Government at the time of the adoption of the Constitution. The same may be said of the constitutional right of Congress to enact certain laws, such as we have under consideration regarding the section of the arid West which at the time of the adoption of the Constitution was not a part of the United States, but which came to it by treaties and over which the Government was given larger and more effective jurisdiction than over the States east of the Ohio River.

Congress has frequently appropriated money for the use of sufferers from public calamities, presumably because of the public good to result. Yet the constitutionality of all these exercises of congressional authority now goes without question.

Again, since Congress has practically unrestricted power to dispose of the property of the United States, including the appropriation of moneys, and has the power to borrow money on the credit of the United States, it necessarily follows, as a logical result, that it has also the implied authority to use the credit of the United States as

a guaranty of public and municipal corporations which may never have to be paid by the United States, but which, as it will appear from a quotation which I will read from an opinion by Judge Gilbert, of the Federal bench, pertains to a matter of public concern coming within the line of public improvements, as the prevention of floods on the Mississippi or the improvement of rivers and harbors.

Let me return again to the very able decision rendered by Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat., 407, where it is said:

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money—

Notice these words—

> to borrow money; to regulate commerce, etc.

Now this is one system of borrowing money; but I realize, however, that it is the purpose to which it is being applied where its constitutionality is questioned. Leaving out the rest of the quotation, which can be supplied by anyone who wishes to read it, the Chief Justice continues:

> The exigencies of the Nation may require that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

Now, Senators, while I am on the subject, the Government, it will be recognized, has certain powers within the States. Of course I recognize that the question as to the limit is a constitutional question which is here presented. I call particular attention to this language:

> Nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers.

Now, if we can create a banking corporation under that authority, which makes no mention of it, and the Government can get behind the banks, even though the money is deposited in such a way as to guarantee the paper money which is issued through these banks, if the Government has that power under that provision of the Constitution, I can see no reason why the same rule should not apply to a case of this kind where the Government merely guarantees the interest on the bonds in the interest of the public good, for a public use, of the community in which the project may be located.

Senator WORKS. Now, we will have to observe the limitation contained in that opinion. The foundation, as I suggested a while ago, is the existing power of the Government and, as I understand the decision, it is to the effect that where that power exists and the establishment or creation of a corparation is necessary as an incident to the *carrying out of* that power, then the Government has the power to

establish the corporation. And so with respect to banks. I have not read the decision to which you referred upholding the right of the Government to use public water on private lands, but I can understand how that can be maintained, because it may aid the Government in taking care of its own lands by enabling the private lands to carry on the project. I realize that theory pretty thoroughly, but the thing that troubles my mind is whether there is any existing power on the part of the Government to which you can attach this incidental power which you are asking Congress to resort to by way of helping securities in which the Government has absolutely no interest.

Mr. KING. Well, as I stated a few minutes ago, I was leading up to that.

Senator WORKS. Well, I was calling your attention to it in this very connection.

Mr. KING. I am very glad to have my attention called to it, because it assists me in reaching it, but we have always found that in arguing our cases before the courts—whether the highest or the lowest in rank—that the courts always think faster than we can talk, and they get away ahead of our argument, and as a rule interfere with and impede the discussion of counsel, as a rule to the prejudice of the court's wishes as well as the counsel talking. I am taking it up in the order in which I have it in my mind and what I deem its logical order.

Just one more quotation from the opinion of Chief Justice Marshall:

> The Government which has a right to do an act and has imposed on it the duty of performing that act must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.
>
> The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another?

And thus the discussion continues. I will not quote any further from this decision, but it establishes priniciples as the foundation or basis upon which I am endeavoring to reason out this matter. It establishes the principle that, while it is not mentioned in the Constitution of the United States that the Government had any power to create a bank or corporation, that it was within its implied or incidental powers, and when we take into consideration the fact that this implied power carried with it the authority to guarantee to one of these corporations or to the people dealing with these banking corporations the payment of every national-bank note that is issued, about which nothing was ever mentioned in the Constitution, but which under this great decision was brought within the incidental and implied powers of the Government, I submit, gentlemen, that the Government has the power to go further, if it sees fit to do so—and as to whether it does, or should do so, becomes and is merely a question of policy—and guarantee the payment of any bond of any municipal or public corporation, regardless of the purpose for which it may be issued. It is within the discretion of Congress to determine whether that purpose comes within the general policy of this Government in the work which it undertakes to perform, and it is not a constitutional question at all.

Senator WORKS (interposing): Now, right there. To what power of the National Government do you attach this as an incident to bring you within that decision?

Mr. KING. Well, as I say, I thought I had made that clear. However, I hope to reach it again soon. I trust you will be patient with me.

Senator WORKS. Oh, I am not impatient. I reserve the right to question you when anything occurs to me as you go on. I think proper and best to mention it.

Mr. KING. Certainly. I am glad that you do so. I only want to explain why I may not have fully answered you as yet. Now, that brings up the question I mentioned yesterday. We have the general policy of the Government which I am going to refer to in an opinion which I referred to yesterday. I will not read it, but I will merely call your attention to a quotation from it—the policy of the Government to deal with the different conditions existing in the public lands of the West. But, even independent of that, take the South, the East, the question of swamp lands, which are included in this bill—there is a question of public health involved in all these matters. The Government has frequently made appropriations for the relief of people who have suffered from floods; the Government has also made appropriations for specific purposes in specific localities independent of the questions of rivers and harbors, even to the destroying of mosquitoes. Even where governmental obligations, those questions were not involved. It is nothing unusual for the Government to make an appropriation for purposes of that kind.

Senator WORKS. I think a good many of those appropriations would be held unconstitutional if they had ever been questioned.

Mr. KING. Well, I do not know why we should get worried about the particular matter now before us and try to make it a test, when, without question, we have let so many of more questionable character escape. Under this decision which I have read you are justified in resolving all reasonable doubts in favor of the constitutionality of the act.

Now, coming to the question; for instance, of reclaiming 100,000 acres of desert land near Yuma, Ariz., even though they were all private lands, we would have in that case the general good, the public good, the admitted good which would result to the public which far exceeds the $400,000 or $500,000, or even millions, appropriated to relieve flood sufferers, for example. On that point I will read you what Judge Gilbert has to say in the case of United States *v.* Hansen, 167 Fed. He said:

> It is only the use of the revenue derived from taxation that is by the Constitution expressly restricted to the payment of the debt and provision for the common defense and general welfare of the United States, and if by implication the funds derived from the sale of public lands of the United States are subject to the same restriction there is no difficulty in the way of holding that the use of the funds as contemplated by the reclamation act is for the common welfare.

That is not the quotation I wanted to read at this particular time, but it is to the point. The point I want to bring out here is that in that decision it was held that, under the act of 1890, Congress recognized the arid section as being all west of the one hundredth meridian by prescribing certain conditions with respect to all patents hereafter taken up under any of the land laws of the United States. I only

mention that as showing what Congress has already recognized as the arid section. In the case of Burley *v.* United States, Circuit Judge Gilbert rendered the decision in which he said that "the policy of reclaiming the arid regions of the West for a beneficial use, open to all the people of the United States, is as much a national policy as the preservation of the rivers and harbors for the benefit of navigation." That was Judge Gilbert's opinion about that. It was partly on that theory that they held that the reclamation act was constitutional, as I remember it. I may possibly have the two cases mixed.

Now, whether we go as far as the judge there has gone or not for the purposes of this argument is immaterial. It may be that that language is a little broad. It may be that while every man can sail his vessel upon the rivers, while they can not upon the farm of every man do as they please, they might do so upon a navigable stream. It becomes only a question of degree, so far as the "public good" may be concerned. For example, until recent years it was held that the taking of a right of way over a man's land for an irrigating ditch was taking private property for a private use.

Senator WORKS. What was involved in that case in which Judge Gilbert rendered his decision?

Mr. KING. Why, the constitutionality of the reclamation act, as I understand it.

Senator WORKS. Of course, we recognize the right of the Government to irrigate its own private lands.

Mr. KING. The question that was involved was as to whether private lands could be reclaimed in Government irrigation projects. Now, to illustrate——

Senator WORKS (interposing). Now, just a moment.

Mr. KING. Certainly.

Senator WORKS. That, I suppose, is incidental to the irrigation of the public domain, or part of the land of the Government itself, and therefore I think it comes within the scope of the decision that you refer to as an incidental means of disposing of public lands, which would probably make it constitutional.

Mr. KING. Well, the incident is a great deal less than the main subject. I will give you some data here which I think will convince you.

Senator WALSH. I suppose if the principle be admitted the proportionate interest could not possibly be controlling. That is to say, if you had the constitutional power to irrigate private lands when they constituted 10 per cent of the project, I suppose you would have the constitutional power to irrigate the lands when private lands constituted 20 per cent of the project.

Mr. KING. Certainly.

Senator WALSH. And when private lands constituted 40 per cent or 50 per cent?

Mr. KING. Yes, sir.

Senator WALSH. And 90 per cent?

Mr. KING. Yes, sir.

Senator WALSH. And 95 per cent and 99 per cent?

Mr. KING. Yes, sir.

Senator WALSH. I do not think you could draw the line at any percentage *so far as the* principle is concerned.

Mr. KING. No; I do not agree with you on that. I think you would have to keep within the reason and spirit of the law. If the purpose of the law is only to reclaim public lands, I do not think you could, by a mere subterfuge, reclaim, say 40,000 acres of public lands in order to reclaim 160,000 acres of private lands.

Senator WALSH. Of course, if it appeared that it was not in good faith, that it was a mere excuse, I would quite agree with you.

Mr. KING. Now, Senators, congressional interpretations of the law go a long ways with supreme courts. I find in the case of Swigart *v.* Baker that the court even went to the extent of quoting the debates in Congress in order to determine what was the intention of Congress. That policy, however, I regard as very dangerous. It is not unusual to find those references in the decisions. I find that persons interested in bills and future interpretation of the law by the courts, take advantage of that; there have been bills introduced and passed, even in the last two or three years, where the parties were trying to get Congress to decide a matter—to render a congressional judicial opinion—in order to use it as a precedent in aiding them to secure a decision of the court, but I do not think the court would go that far.

Now, I have some statistics which I will give you on that subject. In the Uncompahgre project in Colorado there are 34,000 acres of public lands and 106,000 acres in private ownership.

The Garden City project, in Kansas, is all in private ownership.

In the Blackfeet Indian project, in your State, Montana, Senator Walsh, it is all on an Indian reservation, principally allotted to Indians.

The Fort Peck Indian project, Montana, is all on Indian allotments.

The Carlsbad project, New Mexico, is all in private ownership.

The Hondo project, in New Mexico, has 240 acres in public lands and 9,760 acres in private ownership.

Senator WALSH. Is the department committed to the principle that they may authorize and carry out a reclamation project in which no public lands at all are involved?

Mr. KING. Well, so far as the department at present is concerned, I am not prepared to speak on that. There is no decision on it by the present Secretary that I know of. I am only giving the data as I have it. I think the department in previous administrations has unqualifiedly committed the Government to that policy and, I think, rightly.

Senator WALSH. But they have actually followed that principle?

Mr. KING. Yes, sir. So far as I am concerned, I am of the opinion to the effect that you could reclaim private lands as well as some others, especially when it is a public purpose, and that the department, so far as action has been taken, has in effect repeatedly so held.

Now, the Strawberry Valley project in Utah has a very small proportion of public lands; the great majority of it is in private ownership.

In the Okanogan project, Washington, there are 1,234 acres of public lands and 8,666 acres in private ownership. In the Yakima project there are 10,114 acres of public lands, 11,654 acres of State lands,

12,000 acres of Indian lands, while the balance of the 177,658 acres is in private ownership.

Now, I only call your attention to that as showing the policy of the Government in the past as represented by the department. I do not know of a lawyer in the department who hesitates to say that the question as to whether you are reclaiming private or public lands cuts no figure so far as the constitutionality is concerned, except one or two lawyers who never looked into the question until recently, and their natural expression at first glance, like other lawyers, is, "Where do we get our constitutional authority?" But, so far as I know, every lawyer in the department who has fully looked into this question has agreed that it is constitutional.

Senator WORKS. I am waiting very patiently for you to tell us under what constitutional provision you would do this.

Mr. KING. I have endeavored to make this clear. It is under the implied and incidental powers of the Constitution construed as a whole. You might as appropriately ask me under what constitutional provision was the national-bank act passed. It was, as held by the United States Supreme Court, under implied powers of the Government given by the Constitution. There is no constitutional provision which specifically covers this point. I claim that, taking the Constitution as a whole, it is broad enough, and the implied and incidental powers of the Government are great enough as granted under it; that if we can say to a banking corporation, "You can loan money to the people and we will stand behind you," we can say to a public or municipal corporation of any State, "If you want to develop a matter which is of public use we will stand behind you as security for your bonds." The same reasoning applies to the rule in both cases. I am not saying that there is any decision upon the point or any constitutional provision. I have repeatedly tried to clear the atmosphere on this point, yet the question still comes, "Where in the Constitution do you get this power?" just as it repeatedly appeared before the court in the Maryland banking case. I regret my inability to make my position on this point understood.

Senator WALSH. But was not the bank case put upon this ground: That the bank was an instrumentality of the Government of the United States to carry on its fiscal operations? It became a depositary of the Government funds. It took the bonds of the Government. It performed the various other functions intended to aid in the financing of the Government operations. The National Bank case was founded upon that principle.

Now, they say, "We are so desirous that these operations shall go on, that people shall be induced to come and deposit their funds in this bank, so that the bank can take the Government bonds, that we will guarantee to everybody who comes and deposits his money in there that he shall be paid the amount that he deposits."

Mr. KING. Certainly.

Senator WALSH. It is easy enough to follow that line of reasoning, Judge. That is perfectly plain. But you can not speak about an irrigation district out in the State of Montana as being an instrumentality of the National Government for the purpose of carrying out the financial policies and purposes of the Government. You must

find some other basis. The Constitution gives to Congress the power to borrow money.

Mr. KING. Yes. And to loan its credit.

Senator WALSH. What is that?

Mr. KING. Does it not say to loan its credit? As I remember it that power is given.

Senator WALSH. No. It says to borrow money to carry on the enterprises of the Government.

Mr. KING. Well, does not that imply the loaning of its credit?

Senator WALSH. No, sir.

Mr. KING. Well, when it borrows the money it certainly must "loan its credit."

Senator WALSH. Now, we can follow that all right enough.

Mr. KING. Certainly; there can be no question about it.

Senator WALSH. Now, the decision held that the Government having the right to create a United States bank—that is, to create an instrumentality of the Government of the United States——

Mr. KING (interposing). I do not catch your last statement.

Senator WALSH. The court held that the United States having the right under the Constitution to create a bank in order to carry out its purposes, to finance its operations, it had the right as incidental to that power to guarantee depositors in that bank the return of their deposits. Now, whether you accept that or not, you can follow that line of reasoning. But now we come to a proposition of an irrigation district out in the State of Montana, which has not a thing on earth to do with the operations of the Federal Government. It is a local device for the purpose of general cooperation in the reclamation of lands belonging to those parties who constitute the irrigation district. Now, I do not see how you can contend that because the court held that there was an implied power in the Government to guarantee the obligations of the United States bank, that there is an implied power, as you say, to guarantee the bonds of any municipal corporation in the United States, whether connected with the financial operations of the Government or otherwise.

Mr. KING. Now, may I proceed?

Senator WORKS. I want to suggest, before you proceed, that if your views on the subject are right, we have been mistaken all these years in supposing that the United States Government is a government of delegated and limited powers.

Mr. KING. I am not one who believes the Government may constitutionally enact any law not prohibited in the Constitution. My position is that the right to enact laws of this character is impliedly granted, as was held in the Maryland bank case. I have endeavored to go into that question fully. We have reached different conclusions by the same process of reasoning. The same question that is raised here was raised about the constitutionality of the Interstate Commerce Commission. The question of delegated or limited powers was there raised and considered. Now, with all due deference to the Senator from Montana, I did not say an irrigation district is an instrumentality of the Government, nor is it necessary to so assume in order to sustain my position. Without meaning to be in the least offensive, I want to say that his reasoning to me is clearly what we, in logic term "begging the question." The Senator is considering what

the court held in this case to be the law, which I do not question, and has been using what the court held as a basis of reasoning. That is given as a reason. But he has overlooked the fact that if we had that question up here for the first time and the question had not before been raised, the same objection would be made to the constitutionality of that law, except on a broader scale and more effective scale, than in this instance. It is merely a question of degree.

Before the Senator from Montana came in I quoted from the decision in McCulloch *v.* Maryland, 4 Wheat. I will ask permission to reread one sentence:

> Although among the enumerated powers of Government we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce,"

And so forth.

Although we do not find in the Constitution any thing regarding "irrigation districts" or the building of irrigation projects, we do find in the treaties that followed the Constitution that we acquired an immense amount of territory in the Northwest as to which irrigation was one of the features most essential to the making of those lands of any value to the Government, or purchasers from the Government, just as essential and important for that territory or section as any banking law that was ever passed.

If the Government were to try to guarantee individual notes or evidence of personal or individual indebtedness, I can see where the argument of the Senator from Montana and the Senator from California might be plausible as applied to such individual obligations, but whenever the business reaches the status of a public use, such that the right of eminent domain could be exercised, and such that it would tend to build up the country and serve the public good, as mentioned in Judge Gilbert's opinion, then a different question arises. Public use, public purposes, public or municipal corporations are safe tests on the subjects. In view of the fact that we have gone as far as we have with the reclamation act, in view of the fact that we have projects that reclaim lands, whether all or but partly private lands or all public lands, and which are recognized as a part of our system, I think there can be no doubt but that the courts will uphold the constitutionality of an act of this kind and will have less difficulty in doing so than Chief Justice Marshall had in writing his opinion in the Maryland banking case.

I have here an opinion which I prepared more than two years ago on this subject, on request of the Secretary of the Interior, and I find with it, as a part of it, an opinion by State Senator J. Edwin Thomas, of Lawton, Okla., an able lawyer, who was representing the Lawton project. The question there presented was whether the Lawton project could constitutionality be built. It is a very small project in which all the lands are private lands except a very small corner, about 160 acres of Indian land, connected with an Indian school. We were called upon for an opinion, and I have both opinions here. I would like to incorporate his opinion and mine in the record. They state briefly our views upon the subject, and cite some of the authorities which you might want to read.

(The opinion referred to by Mr. King is here printed in full, as follows:)

DECEMBER 27, 1913.

OPINION BY WILL R. KING, CHIEF COUNSEL UNITED STATES RECLAMATION SERVICE.

In re authority of the Secretary of the Interior of the United States to reclaim private lands when no public lands are embraced within a proposed project.

MY DEAR MR. SECRETARY: Attached hereto is an opinion prepared by Senator J. E. Thomas, of Lawton, Okla. On account of pressing matters before the commission, I have not had the desired time to prepare as extensive an opinion as I would like or as may have been expected.

I think, however, Senator Thomas has covered the subject quite fully, and I concur in the views as expressed in his written opinion submitted herewith. In fact, I have concluded there is but little, if any, doubt but that the Government, through the Secretary, by its usual "irrigation project" plan, has full power to provide for the reclamation of arid lands within the States mentioned in the act, regardless of whether all or any part thereof may be private or public lands of the United States, so far as the question may be involved in any of the States known as arid States is concerned. It is unnecessary to determine whether that authority exists as to other States of the Union not recognized as being within the arid belt. So far as I have been able to discover, the only declaration in any of the judicial decisions that seem to question this power is contained in the Kansas-Colorado case, in which the writer of that opinion suggests that, in his judgment, the Government would not have the authority to go into the Atlantic States and proceed to reclaim private lands.

It will be observed, however, that this statement was not essential to a decision in that case, being mere dictum, and only given by way of illustration; hence that feature was not argued before the court at that time; and Judge Morrow, in Burley *v.* United States (179 Fed., 1), treats that statement as not being inconsistent with the policy of reclaiming arid private lands in Western States by use of the reclamation fund. This is for the reason, as I interpret Judge Morrow's remarks, that the Eastern States are not within the arid belt, on account of which a different rule may prevail. It becomes manifest, therefore, that while there might be outside the arid belt an occasional tract of land where irrigation would be beneficial, this condition would not exist on sufficient scale to justify irrigation projects in the sense in which that term is used in the arid sections, without which the use of the funds would be for a private purpose and not for a public use, or not for a purpose in which the general public in the State may be concerned.

In 1890 (26 Stat. L., 391, and Green *v.* Wilhite, 14 Idaho, 238) Congress recognized the arid section as being all west of the one hundredth meridian, by expressly declaring—

"That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States."

This recognition of the arid section is also supplemented by the reclamation act itself. While I do not deem the Kansas-Colorado case an authority against us, I think the above consideration is adequately responsive to the dicta therein expressed on the subject.

As stated by Judge Morrow in Burley *v.* United States (179 Fed., 1), the public welfare requires that the lands in private ownership should be reclaimed and made productive as well as lands in public ownership and that "to do this effectively and economically within the available water supply, large tracts must be brought into relation with a single system or project."

In this connection it will be observed that every State within the arid belt has made some provision with reference to the reclamation of arid lands, thus in conjunction with the Government, recognizing them as such. We have then not only this recognition by Congress but the mutual, or, to say the least, *applied agreement to that* effect by each of the States through legislative and *constitutional enactments.*

Furthermore the Government supplements this recognition by a treaty entered into with the Government of Mexico on the subject. Congress has also recognized the right to reclaim private lands by making the reclamation act extend to the State of Texas, in which the United States has never owned any public lands, giving us thereby a further interpretation of the law bearing upon the subject, from a national standpoint.

Moreover, your predecessors in office have so interpreted the reclamation act by the construction of the Orland project in California and the Garden City project in Kansas, if not in others, in which there were no public lands at all. There are also other projects in which the proportion of public lands is so small as to make their inclusion therein as a matter of law of but little, if any, importance. The action of former Secretaries in constructing these projects, I take it, necessarily involved a determination of the question here presented, and constitutes a precedent with the same force and effect as would be their decision upon any other question involving a construction of the Federal statutes.

Another ground upon which it would seem the Lawton project, even though no public lands should be included therein, would come within the implied authority of the Secretary under the reclamation act and amendments thereto, is that the Government has the implied power to experiment on small projects in order to determine the feasibility of larger ones under similar climatic, soil, and political conditions, as, for example, to ascertain the advisability of reducing the units to the smallest possible limit; especially in a State where no irrigation projects have been constructed by the Government, as in Oklahoma, and in which it requires an experiment on a moderate scale to determine the advisability of constructing projects in that semiarid State on a large scale. In this connection the fact that Congress included Oklahoma as one of the States under the reclamation act, notwithstanding the knowledge (which the law presumes all have) of it being a semiarid State only is worthy of serious consideration.

With these few observations, supplementing what Senator Thomas has said, I am firmly of the opinion that the courts would uphold the validity of the department in the construction of the requested project at Lawton, Okla.

However, in view of the letter addressed to you by Senator Thomas, dated December 23, 1913, accompanying this memoranda, to the effect that the project may include a substantial tract of public lands ("substantial" when small size of proposed project is considered), it has become unnecessary to determine at this time whether it is within the authority of the department to construct a project which may include private lands only. I have, however, investigated the subject, not only on account of your request that I do so, but for the further reason that the question will probably arise respecting projects in other localities at an early date.

What I may have heretofore said in oral reference to the subject had reference more particularly to the fact that Members of Congress and others have at times, and may again, urge that objection to the making of appropriations for the reclamation of arid and swamp lands, drainage, etc., making it advisable to urge a change in the law as to permit acceptance by the department of conveyances of private lands when, by the Secretary, deemed advisable in such cases. And in this connection it might be well to note that there may be a distinction between the expenditure of public moneys for the reclamation of swamp lands east of the arid belt and that of the reclamation of arid lands in the Western States.

In the reclamation of swamp lands outside of the arid States the moneys to be used therefor come out of the general fund and hence may be derived from the funds created by taxation imposed under congressional acts, while thus far the reclamation of arid lands has been accomplished with moneys received from the sale of public lands, respecting which the courts in some instances suggest a distinction, to the effect that what may be unconstitutional in the use of funds in one instance might be constitutional in the other. For example, in United States *v.* Hanson (167 Fed., 881, 885), Judge Gilbert, in a very able opinion, observes:

"It is only the use of the revenues derived from taxation that is by the Constitution expressly restricted to the payment of the debts, and provision for the common defense and general welfare of the United States. And if, by implication, the funds derived from the sale of public lands of the United States *are subject to* the same restriction, there is no difficulty in the way of

holding that the use of the funds contemplated by the reclamation act is for the common welfare. It is as clearly as much so as are the grants of lands in aid of the construction of transcontinental railroads which have been judicially sustained."

It will be observed that the above excerpt does not hold the funds available to be limited to those derived from sale of public lands, but that if that be the law the objection is untenable respecting the use of funds derived from that source.

WILL R. KING, *Chief Counsel.*

Hon. FRANKLIN K. LANE,
Secretary of the Interior.

(The opinion of State Senator Thomas, of Lawton, Okla., referred to in the opinion of Mr. King, is here printed in full, as follows:)

WASHINGTON, D. C., *December 22, 1913.*

To the SECRETARY OF THE INTERIOR,
Washington, D. C.

SIR: In compliance with your request, and as a further presentation of the proposed Lawton irrigation project, I submit herewith a statement and an opinion upon the following proposition:

"Has the Secretary of the Interior the authority under the reclamation act and the amendments thereto to expend the reclamation fund in the reclamation and irrigation of arid and semiarid lands in the States and Territories mentioned in the act and the amendments thereto, where all the lands to be reclaimed and irrigated are in private ownership?"

The reclamation act was passed and approved June 17, 1902 (32 Stat., 388). The title of the act is as follows:

"An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands."

In section 1 of said reclamation act it is provided that the proceeds from the sale of said lands shall be set aside, reserved, and appropriated as a special fund in the Tresury, to be known as the reclamation fund, and to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories and for the payment of all other expenditures provided for in this act.

The questions here presented are:

"First. Is the authority given the Secretary of the Interior in section 1 of said act broad enough to authorize him to expend the reclamation fund in the construction and maintenance of irrigation works for the irrigation of lands wholly within private ownership? And

"Second. If the authority to expend the reclamation fund in the manner as indicated is conferred in said act, then has Congress the power under the Constitution to enact such a law?"

The constitutionality of the reclamation act has been passed upon. In the case of the United States *v.* Hanson (167 Fed., 881), paragraph 1 of the syllabus is as follows:

"The reclamation act of June 17, 1902 (ch. 1093, 32 Stat., 388, U. S. Comp. Stat. Supp., 1907, p. 511), providing for the irrigation by the United States of arid public lands, is within the power of Congress as to lands within the States as well as Territories, under the Constitution, article 4, paragraph 3, giving it power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' and is not in violation of the Constitution on the ground that it authorizes the expenditure of public money without an appropriation, since it is in itself an appropriation of the proceeds of land sold, nor as delegating legislative authority to the Secretary of the Interior."

The act itself having been passed upon, the remaining question, whether or not the fund can be expended upon projects wholly within private ownership, is a question of interpretation.

In the case of Burley *v.* United States et al., Circuit Court of Appeals, ninth circuit, *July 5, 1910* (179 Fed., 1), it was held that the United States had the *right to condemn private* lands for a reservoir site for the Payette-Boise *project, although a portion* of the lands to be irrigated therefrom were under

private ownership. The court said: "The act clearly provides for the irrigation of private lands under the conditions therein specified, where such lands are arid and within the limits of an irrigation project deemed by the Secretary of the Interior to be practicable and advisable."

The Supreme Court of the United States in the case of Fallbrook Irrigation District *v.* Bradley (164 U. S., 112, 161, 17 Sup. Ct., 56, 64, 41 2d ed., 369) held in substance that the building of irrigation works and the irrigation of arid and semiarid lands, thus reclaiming and making productive barren lands and increasing the material wealth and prosperity of the people, is a matter of public interest, serves a public purpose not confined to the landowners or even to any one section of the State.

In the same case it was held that "the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use; and the statutes providing for such irrigation are valid exercises of legislative power."

Circuit Judge Morrow, in the case of Burley *v.* United States, above herein cited, says:

"The policy of reclaiming the arid region of the West for a beneficial use open to all the people of the United States is as much a national policy as the preservation of rivers and harbors for the benefit of navigation."

In sustaining his statement of the broad scope of the provisions of the reclamation act, Judge Morrow quotes from President Roosevelt's message to Congress in 1901, recommending and urging the legislation which resulted in the passage of the act, wherein the President says:

"The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi Valleys brought prosperity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production, while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent western competition with eastern agriculture. Indeed, the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries, which would not otherwise come into eixstence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

In section 3, Article 4, of the Constitution of the United States is found the following authorization of power: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The power to "dispose of" includes the power to sell the public lands, and the power to sell, by necessary implication includes the power to use the proceeds, which power is given without limitation. It has been said that the "reclamation fund" is merely a medium of exchange by which lands are disposed of and irrigation works acquired in exchange, and that the words "dispose of" as used above include such an exchange. In nearly every instance of the private ownership of lands included, or to be included, in an irrigation project, the said lands were formerly public lands and therefore have already by their sale contributed to the "reclamation fund." The fact that pioneers have already bought and paid for the lands, in most instances from money secured by mortgages thereon, should not exclude them from the benefits of a fund they helped to create when other sections of the country having contributed nothing to the fund are permitted to enjoy benefits therefrom. Such a discrimination is not the policy of the United States. The reclamation act has been interpreted without regard to whether the lands to be irrigated are public or private. In the consideration of a proposed irrigation project the chief matters of concern are: First, do the lands need irrigation? second, would they be benefited by irrigation? and third, is the project otherwise feasible?

From the beginning the reclamation service has made little or no distinction in the lands irrigated whther they be public or private. The Eleventh Annual Report of the Reclamation Service 1911–12, in a discussion of the various projects undertaken, gives the status of the irrigable lands in each project, and the report shows that in the works undertaken and constructed about one-half of the lands are in private ownership, the balance are public lands belonging to the United States, State lands, Indian lands, and lands belonging to railways.

In the Orland project, California, but a small part of the irrigable area is public, while the remainder is under private ownership.

In the Uncompahgre Valley project, Colorado, 34,000 acres are public lands, while 106,000 acres are in private ownership.

The Garden City, Kans., project is all in private ownership.

The Blackfeet (Indian) project, Montana, is all on Indian reservations principally allotted to Indians.

The Fort Peck (Indian) project, Montana, is all in Indian allotments.

The Carlsbad project, New Mexico, is all under private ownership.

The Hondo project, New Mexico, has 240 acres public land, while 9,760 acres are under private ownership.

The Strawberry Valley project, Utah, has a small portion of public lands, while the greater part of the 60,000 acres irrigable is under private ownership.

In the Okanogan project, Washington, 1,234 acres are public lands, while 8,666 are under private ownership.

In the Yakima project, Washington, 10,114 acres are public lands, 11,654 acres are State lands, 12,000 acres are Indian lands, while the balance of 177,658 acres are under private ownership.

In addition to the interpretation given the act by the Reclamation Service, rendering it applicable to lands in private ownership as well as those owned by the United States, Congress has likewise interpreted the act as capable of having its provisions extended to land wholly in private ownership. By the act of February 25, 1905 (33 Stat., 814), the provisions of the reclamation act of June 17, 1902, were extended to that part of Texas bordering on the Rio Grande which could be irrigated from a dam constructed near Engle in the Territory of New Mexico.

By the act of March 4, 1907 (34 Stat., 1357), an appropriation of $1,000,000 was made available as needed and to be expended under the direction of the Secretary of the Interior for the construction of the dam mentioned in connection with the irrigation project on the Rio Grande.

By the act of June 12, 1906 (34 Stat., 259), the provisions of the reclamation act were extended so as to include and apply to the entire State of Texas where there never has been any public lands of the United States.

The courts having sustained the constitutionality of the reclamation act and having held that it was applicable to private as well as public lands, the policy of the Reclamation Service being that no distinctions are made as to whether the lands coming under any irrigation project are public or private, and Congress having likewise interpreted the law so that the fund contributed by States and Territories having public lands may be extended to States having no public lands, and therefore having contributed nothing to the said "reclamation fund," I can see no reason why an allotment can not be made to survey, investigate, construct, and maintain an irrigation system upon private lands as well as upon those owned in whole or in part by the United States.

Respectfully submitted.

J. EDWIN THOMAS.

Mr. KING. Now, I might be going a long ways when I make another suggestion, but if it is refused I assure you that I will not in the least feel offended. I have considered before this committee several questions which are more fully discussed in the case of Hough *v.* Porter, and if it is agreeable to the committee I would like to incorporate the opinion in that case as a part of my remarks here. I think one justification for doing so is that I wrote the opinion and it accordingly gives my views. It was concurred in by four other members of the court, hence should have some weight.

Senator WALSH. Mr. Chairman, I think the opinion is well worth any publicity that may be given to it, and I sincerely hope that it will be made a part of the record.

The ACTING CHAIRMAN. If there is no objection it will go into the record.

Mr. KING. While for the convenience of Senators I will submit, preceding this opinion, the syllabus which contains the conclusions announced on each point in the entire opinion, I trust you will find *time to read the* body of the opinion which discusses the act of 1866 *and the desert-land* act of 1877 and gives the reasons for reaching the

conclusion announced respecting riparian rights, the ownership of government in the waters, the general policy in respect thereto, and many other features which I have but briefly touched upon in my remarks before the committee.

(The opinion in Hough *v.* Porter referred to was subsequently submitted and is here printed in full, as follows:)

IN THE SUPREME COURT OF THE STATE OF OREGON.

Annie C. Hough, Mary J. Kittredge, Marion Conley, W. H. Hayes, J. M. Hayes, John Hayes, A. C. Geyer, and W. H. McCall, plaintiffs and respondents, *v.* S. A. D. Porter, C. D. Porter, administrator; Daisy Porter, widow; and W. F. Porter, E. A. Porter, and Carl D. Porter, minor heirs of S. A. D. Porter by Daisy Porter, guardian; P. G. Chrisman, John C. Porter and James S. Porter, his guardian; F. M. Chrisman, B. F. Lane, Johnie Lane, C. C. Jackson, Occidental Land & Improvement Co., a corporation (Chewaucan Land & Cattle Co., a corporation, its grantee); P. W. Jones, C. E. McKune, Mary C. Brown, and E. D. Lutz, defendants and appellants; and George Durand, L. Huesman, Morris Ranner, Lucinda Egli, John Partin, jr., George H. Small, L. P. Klipple, Emil Egli, Henry Egli, Martie Ward, Angelino West, Mary Small, James M. Martin, J. M. Sherer, Lulu Corum LaBrie, Isa M. Corum, Jewell D. Corum, Maude Small, Walter C. Buick, J. Hall, Corinna Buick, C. D. Buick, F. K. Henderson, R. E. Smith, J. A. Smith, J. C. Harrow, J. M. Small, and F. F. McCarty, defendants and respondents—appeal from the Circuit Court for Lake County—Hon. Henry L. Benson, judge.

J. C. Rutenic for plaintiffs and respondents.

W. J. Moore (on brief) and E. B. Watson for defendants and appellants.

Lionel R. Webster for defendants and respondents Walter C. Buick, Lulu Corum LaBrie, Isa M. Corum, Jewell D. Corum, and J. M. Small.

Coovert & Stapleton (on brief) for defendant and respondent George H. Small.

Roscoe R. Johnson, amicus curæ.

Argued and submitted February 7, 1908; reargued and submitted August 4, 1908; for former opinion, section 95, Pac., 732.

The following is the syllabus, supplemental opinion, and opinion on rehearing, reported in 51 Oregon, 319; 98 Pac., 1083; 102 Pac., 728 (opinion in 95 Pac., 732, omitted, except syllabus, which is included):

Hough *v.* Porter (95 Pac., 732; 98 Pac., 1083; 102 Pac., 728)—Syllabus prepared, before opinion filed, by writer of opinion—Will R. King, judge.

(NOTE.—The first opinion (95 Pac., 732) decided in substance what appears in the first 10 points in the syllabus herein. Deeming the first opinion unimportant, so far as pertains to the bill under consideration, I have submitted the principal opinion rendered after reargument, together with the opinion on rehearing. These opinions begin with section 11 of the syllabus, with heading "Appropriation of waters." (Acts of 1866 and 1877.) Paragraphs and points in the opinion are numbered to correspond with numbers given in the syllabi to follow.—W. R. K.)

SYLLABUS.

PARTIES—JOINDER.

1. Where, in a suit to determine water rights in a stream for irrigation purposes, the determination of the rights of the litigants could not otherwise have been had with reasonable accuracy, nor the decree, when entered, effectively enforced, without the presence of other parties, the court was authorized to direct that they be brought in and made parties, under sections 41, 394, B. & C. Comp., providing that, when complete determination of a controversy can not be had without the presence of other parties, the court shall cause them to be brought in.

RIGHTS IN STREAM—ACTION—PARTIES—JOINDER.

2. Where a diversion or use of water of a stream in controversy or any of its branches by any of the defendants affects the interest of each of the plaintiffs, all are interested in the relief demanded and may join as plaintiffs to secure protection of their rights; and same rule determines who may be made defendants.

COMPLAINT.

3. Where, in a suit to determine irrigation rights, the complaint sufficiently charged an unlawful interference with plaintiffs' rights in the stream by defendant P., and then alleged that all the other defendants had, or claimed to have, some rights or interests in the waters of the stream, the exact nature of which was to the plaintiffs unknown, but that defendants' interests, if any, were inferior to the rights of plaintiffs in such waters, the complaint sufficiently pleaded a cause of action against all the defendants under section 394, B. & C. Comp., providing that any person may be made a defendant who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

PARTIES—NEW PARTIES.

4. A statute giving a court discretionary power to require all interested to be made parties, implies the power necessary to carry orders and references thereto into effect.

JUDGMENT—CONCLUSIVENESS—PARTIES OF RECORD.

5. The failure on the part of some defendants affirmatively to assert their rights can not affect the interests of others in the proceedings but will preclude those in default from subsequently asserting their claims as to matters in controversy against the rights there determined.

RIGHTS OF DEFENDANTS INTER SE—DETERMINATION.

6. Section 391, B. & C. Comp., abolishes crossbills, but provides that, in actions at law, where defendant is entitled to relief arising out of facts requiring the interposition of a court of equity and material to his defense, he may, on filing his answer therein, also as plaintiff file a complaint in equity in the nature of a crossbill, on which the issue may thereafter be tried as in a suit in equity. *Held*, that under such section, in a suit in equity to determine irrigation rights, defendants were entitled to set up their claims inter se in their answers, and have the same adjudicated on such notice as the court may prescribe.

SAME—TRIAL OF ISSUES.

7. The right of defendants to an adjudication of their rights inter se, is limited to proceeding where the cause of the suit is one arising out of or having reference to the subject matter thereof.

PROCESS—IN ANCILLARY PROCEEDINGS.

8. Defendant, desiring an adjudication of his claim against his codefendant, may cause summons to be issued under the original title of the suit, and have the same served on his codefendants, with a copy of his answer, or he may have served a copy of the order of the court, requiring his codefendants to appear and respond to the affirmative matter in the answer, within the time therein specified.

RIPARIAN OWNERSHIP.

9. There is no such thing as prior riparian ownership so far as distribution of water for irrigation purposes between riparian owners is concerned; the rights of a riparian owner to the waters being a variable one, depending on use by other proprietors.

WATERS AND WATER COURSES—DIVERSION—EXTENT.

10. More explicit evidence is required for the determination of water rights between riparian owners than under other claims of right, and in some instances, where the acreage is large and water scarce, a distribution by the rotation method, or by periods of time, rather than by a division of its quantity, may become necessary.

APPROPRIATION OF WATERS.

1. Act of Congress, July 26, 1866, chapter 262, section 9 (14 Stat., 253; U. S. Comp. St., 1901, p. 1437), relative to the appropriation of water, was *merely a recognition* of rights existing at the time rather than the creation *of a new one.*

STATUTES—TITLE OF ACT.

12. The title to an act of Congress is not required to embrace all its provisions, for which reason it is necessary to look to the body of the act to ascertain the intention thereof.

PRIOR APPROPRIATION.

13. It is necessary to the procurement of title to lands under the desert land act (act Cong., Mar. 3, 1877, ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548) that the inception of the title to the water located for such purposes depend upon a bona fide prior appropriation.

DEDICATION—WHAT CONSTITUTES.

14. A dedication is the devotion or giving of property for some proper object and in such manner as to conclude the owner.

DEEDS—"RESERVATION."

15. A "reservation" is something extracted from the whole res covered by the general terms of the grant, lessening the thing granted from what it would otherwise have been.

PUBLIC LANDS—EXTENT OF TITLE.

16. In order to determine the extent, under the law, of a title included in a conveyance from the Government, whether by grant, patent, or otherwise, we must take into consideration all acts in force at the time affecting the public domain, in order to ascertain what interests remain subject to transfer.

PUBLIC LANDS—GRANT—RESERVATION.

17. A reservation of any interest in lands by a legislative enactment is as effective, as a matter of law, as if expressly stated in the grant, patent, or instrument through which title may be asserted.

PUBLIC LANDS—CONVEYANCE—RESERVATIONS.

18. Our form of government necessarily gives rise to rights and privileges unknown to the common law, and accordingly not covered by the terms in general use under it, for which reason it is not important by what term such reserved interests in land may be designated.

PUBLIC LANDS—DISPOSAL—RESERVATIONS.

19. The Government can not, by legislation, determine for any State, after its admission, what its legislation relative to riparian or other water rights shall be, but may dispose of its public lands and all rights incident thereto in such manner as it may deem best, and either at the same time, or by separate acts, make such reservations therefrom, by grant, dedication, or otherwise, as it may see fit.

DISPOSITION OF RIPARIAN INTERESTS.

20. The water flowing over the public domain is a part thereof, and the General Government may grant or otherwise dispose of its riparian interest separate from the rest of the estate.

ACQUIREMENT OF WATER RIGHTS.

21. Under the desert land act (act Cong., Mar. 3, 1877, ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548) no limit is fixed as to the time a right to the acquirement of a water right may be exercised, except that he who first diverts and applies it to a beneficial use is given the better right thereto.

CONVEYANCE—RIGHTS OF GRANTEE.

22. Anyone acquiring title to any part of the public domain subsequent to the date of the act of Congress of March 3, 1877 (ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548), accepted it, with title thereto, with full knowledge of law in force at the time and subject to the full import thereof.

DEDICATION—SUPPLEMENTARY ACTS.

23. Acts by which reservations or dedications by legislative enactments are required to be expressly stated in the instrument of conveyance are supplementary only, and while convenient for record, add nothing to the legal effect of such reservations therein.

POWER OF GRANTOR.

24. Like any other grantor, the Federal Government can convey no greater title than it has.

DEDICATION—EXTENT—EFFECT.

25. The extent and legal effect of a dedication, as well as the manner in which the recipient of the benefits to accrue therefrom shall exercise the rights bestowed, must be determined from the instrument making such dedications, by construing such act in conjunction with the conditions then existing which give rise to the dedication.

RESERVATIONS—APPROPRIATION FOR IRRIGATION AS EFFECTED BY DESERT-LAND ACT.

26. The legal effect of the language in the act of Congress of March 3, 1877 (ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548), namely, "there shall be and remain and be held free for the appropriation and use of the public for irrigation," etc., constitutes a reservation and dedication to the public of all interest, riparian or otherwise, held at the time by the National Government, so far as such interests affect the uses for irrigation and other purposes there enumerated, from which it follows that this act abrogated the common-law rule respecting riparian rights as to all lands settled upon or entered after March 3, 1877.

STATUTES—CONSTRUCTION—PRESUMPTIONS.

27. In construing legislative acts respecting the disposal of public lands, it must be presumed that the best possible results for all concerned were intended by the legislative body and, where practicable, such construction should be applied as makes such intent effective.

DESERT-LAND ACT—OPERATION AND EFFECT—RIPARIAN RIGHTS.

28. While the legal effect of the desert-land act (act Cong. Mar. 3, 1877, ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548) was to abrogate the modified doctrine of riparian rights as to all lands to which title has been acquired after the enactment thereof, it does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic and stock requirements.

RIGHTS OF RIPARIAN OWNER.

29. Every riparian owner, therefore, regardless of the date of settlement, is entitled to the quantity of water reasonably essential to his domestic use and for the watering of his stock, including sufficient supply for the proper irrigation of such garden produce as may be essential to the proper sustenance of his family.

SETTLEMENT OF LANDS ON STREAM—APPROPRIATIONS.

30. Settlement upon land bordering upon or through which a stream may flow, or to which a natural source of water supply may be adjacent, or upon which it may be situated, is in itself notice that sufficient water for domestic uses and requirements incident thereto are and will continue to be demanded; but to constitute an appropriation for mining, irrigation, or power purposes, some steps toward a diversion thereof, or other good and sufficient notice, is necessary.

RIPARIAN RIGHTS.

31. The references in the code to riparian rights constitute a recognition of whatever riparian rights the landed proprietor may have, but do not attempt to define, nor to in any manner establish any rule respecting such interests. The case of Sturr *v.* Beck (133 U. S., 541; 10 Sup. Ct., 350, 33 L. ed., 761), together with Oregon cases, examined and held not in conflict with the conclusions here reached.

DECISIONS OF APPELLATE COURTS—EXTENT OF, AS PRECEDENTS.

32. Decisions of an appellate court are precedents only to the extent of the points presented to the court and considered and there determined by it.

WATER AND WATER COURSES—ARTIFICIAL CHANNELS—APPROPRIATION.

33. After high-water channels are artificially opened, and after they, together with the cuts dug connecting them with the main stream, have been used by the parties opening them and by their successors in interest, and such use is acquiesced in and recognized as branches of the main creek by

others on the main stream and its tributaries and branches, for the period prescribed by the statute of limitations, they become natural channels, and owners of lands adjacent thereto are in law entitled to the same consideration and to the same rights in respect thereto as are those on the main and unquestioned channel.

WATERS AND WATERCOURSES—WHAT CONSTITUTE.

34. Where the water spreads, having no well-defined current, as into a marsh, it can not be deemed a watercourse, and accordingly does not come within any rule permitting a claim thereto as a riparian owner.

WATER AND WATERCOURSES—DIVERSION.

35. Where a channel has been closed, artificially or otherwise, and the water diverted therefrom during the low-water season of each year for 10 years it loses its riparian character for that portion of each year for which the obstruction and deprivation of the water thereof occurred.

WATERS AND WATERCOURSES—APPROPRIATION FOR IRRIGATION—RIGHTS OF RIPARIAN OWNERS.

36. Evidence examined, and held that, while the relative rights of the parties for irrigation purposes are to be awarded in accordance with the respective dates of appropriation for irrigation purposes, these rights are subject to the right of each of the riparian proprietors to insist upon a continuous flow of sufficient water to meet their domestic demands, together with such additional supply for the watering of a reasonable number of stock for each, the depletion of which stream shall not be sufficient that it may become stagnant or injurious to the health of those or their stock using it.

APPEAL AND ERROR—REVIEW—SUFFICIENCY OF EVIDENCE—REMAND FOR FURTHER TESTIMONY.

37. Where the testimony before the appellate court is not ample for a determination of the quantity to be left in the stream properly to supply the domestic and other natural wants and necessary requirements of the riparian owners along the controverted stream, the appellate court may determine other points upon which the testimony is adequate for the purpose and remand the cause to the court below, with permission to take further evidence and to enter a supplemental decree determining the continuous flow necessary to the full protection of the riparian interests of the parties to the suit.

APPROPRIATION—PRIORITIES.

38. The surplus waters remaining after the domestic and stock demands of riparian owners on all lands entered subsequent to March 3, 1877, are subject to appropriation, and rights thereto vest in the order of time in which the water has been diverted and applied to a beneficial use.

"MINER'S INCH" DEFINED.

39. The word "inch," as used with reference to water for irrigation purposes, is estimated on the basis of 40 inches to 1 second-foot.

"DUTY OF WATER."

40. The term "duty of water" as used with reference to water for irrigation purposes means the quantity essential to the irrigation of any given tract.

"HEAD OF WATER."

41. The term "head of water" as used with reference to water for irrigation purposes is the quantity entering the intake of any canal or ditch.

IRRIGATION—APPROPRIATION.

42. Testimony as to duty of water examined, and held, that from one-third to two-thirds of an inch per acre, estimated on basis of 40 inches to 1 second-foot, is ample for the irrigation of the lands involved.

APPROPRIATION—METHOD.

43. No certain method is essential to a valid appropriation of water. An effective diversion may be made without ditches by construction of dams in the slough or other channels, thereby subirrigating the lands, or by overflowing them, or by any process which may result in the successful application of the water to a beneficial use.

APPROPRIATION—METHOD OF USE.

44. The water must be used in such manner, and such economical methods must be adopted in its application to uses desired, as will secure the greatest duty available, even though it becomes necessary to change at considerable expense the old methods, which had their origin when there was but little demand and the supply correspondingly abundant.

APPROPRIATION—LIMIT OF RIGHT.

45. Beneficial use by and needs of the appropriator, and not the quantity originally diverted, nor the capacity of ditches constructed for the purpose, determines the limit of his rights.

APPROPRIATION—TACKING.

46. The right of an appropriator of water can not be tacked to that of a mere squatter upon public lands who, while he may have applied the water in the irrigation of the land subsequently owned by such subsequent appropriator, has abandoned it.

APPROPRIATION—TRANSFER OF RIGHT.

47. But a mere squatter upon public lands may acquire such an interest in the right to the possession thereof that he may, even by parole, transfer his rights therein to another, in which event the rights of the purchaser thereof, claiming under the doctrine of prior appropriation, relate back to the time of the original diversion.

APPROPRIATION OF SQUATTER—CONVEYANCE OF INTEREST.

48. A mere claim of right to the land held by a squatter, if accompanied by a diversion and application of the water in the reclamation thereof, is sufficient to entitle him to convey to another his interest in the water right, together with such interest as he may have in the land to which the water may be appurtenant.

SWAMP LANDS—WATER RIGHTS FOR.

49. The fact that lands may have originally been swamp lands and reclaimed, and title acquired thereto as such, does not preclude the owner from acquiring a water right for the irrigation thereof.

IRRIGATION—RECLAIMED SWAMP LANDS.

50. When lands are shown to be swamp, and reclaimed as such, it will be presumed that prior to its reclamation no irrigation thereof was necessary; but when once reclaimed, if in an arid district, it comes within the same rule and the same law respecting irrigation and riparian rights as applies to other agricultural lands in the vicinity.

APPROPRIATION—PRIORITIES—DITCHES.

51. A party claiming as an appropriator can not, for the purpose of establishing a right prior to another, avail himself of a ditch constructed for drainage, unless it appears that such ditch was, at the time of and prior to the inception of other rights, intended for irrigation purposes as well.

APPROPRIATION—PRIORITIES.

52. Where a person files on land under the desert land act (act Cong., Mar. 3, 1877, ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548) and makes the affidavit required to the effect that the lands are desert in character and unreclaimed he will not be permitted to assert a right to water for the irrigation as having been initiated prior to the date of such entry.

APPROPRIATION—FAILURE TO USE WATER DIVERTED.

53. Where an appropriator fails to use the full amount of water diverted and for an unreasonable time delays increasing his use, any subsequent increase in either a diversion or use thereof is made subject to the intervening rights.

APPROPRIATION—CHANGE IN METHOD.

54. Where water has been appropriated and applied in the irrigation of a tract of land, and after and during a long period of use in a certain manner in a certain locality, other rights in the stream attach, such a change in the appropriation may not be made, either of the point of diversion or of the place of its use, where to make such change will substantially prejudice the terests of such other appropriators.

APPROPRIATION.

55. When, for the purpose of diverting water for a beneficial use, a ditch is commenced, and within a reasonable time the work thereon is prosecuted to completion and water turned into it and applied to the use therein, the right to the appropriation, to the extent of the quantity diverted and applied, relates back to the commencement of the work.

APPROPRIATION—TENANTS IN COMMON—DETERMINATION OF RIGHTS.

56. When parties claim their rights through the same diversion and from the same ditch, through which the appropriation was originally made by them or by their predecessors in interest, they are tenants in common; and where, in a suit with others on the stream involving rights thereon, no issues are framed between such tenants in common, their relative rights may be left undetermined and only their rights as against other parties to the suit will be decreed.

DIVERSION—APPROPRIATION.

57. When tenants in common claim a water right by reason of the construction of a canal, and subsequently the water is permitted to flow down the channel and is elsewhere diverted, the inception as well as the limit of their rights, as against intervening appropriators, are determined by the capacity of the canal mentioned and not by any subsequent diversion, either in place or in time.

IRRIGATION—CHANGE OF METHOD.

58. Parties owning the right to use water may change the method of conveying it to the point of use, if such change does not materially prejudice others' rights; and in doing so any dry ravine, gulch, or hollow, as well as the natural channel of a stream, may be used by the appropriator of water in the transmission to the place of use.

APPROPRIATION—METHOD OF USE.

59. Where water is conveyed through any natural channel or watercourse the user or users may, when practicable to do so without substantial prejudice to others' rights, let the water thus diverted commingle and take it out at some other point.

DIVERSION—CHANGE OF METHOD—LOSS BY EVAPORATION.

60. Where a right to the use of water is acquired through and by the construction of a ditch tapping any source of water supply and the users thereafter elect to take the water thus diverted from other points on the stream, due allowance must be made for loss by evaporation, including such loss as may occur under different methods of use and distribution, which loss must, so far as practicable of ascertainment, be deducted from the quantity awarded under the original diversion and method of use.

APPROPRIATION—BENEFICIAL USE.

61. A bona fide intention to devote water to a beneficial use may comprehend the use to be made by or through other persons and upon lands other than those of the appropriator.

APPROPRIATION—METHOD.

62. Rights, as against third persons, to the use of water may be initiated through a ditch heading upon and tapping the source of water supply upon the lands of another, from whom no easement has been acquired, but which may, by the owner of such land, be revocable, and none but the owner of the premises across which the ditch is constructed are in a position to complain, and where such owner makes no issue and offers no proof thereon this feature will be disregarded.

WASTE WATER—APPROPRIATION.

63. Where water is claimed as the "waste" waters from the farm of an adjacent water user all the water in excess of that caused by and resulting from seepage is but the quantity diverted by such appropriator in excess of his needs and accordingly in excess of the quantity to which he may be entitled, and the person receiving and applying the excess to a beneficial use acquires a vested right therein, as would an appropriator of any other surplus water, the inception of which right, like that of any other appropriator, *dates from the first steps* taken to provide for its use.

ADVERSE USE—EVIDENCE.

64. Under a plea of title by adverse user a showing of a continuous application of the water for a beneficial use by an upper proprietor for more than 10 years makes a prima facie showing under such claim to defeat which it is incumbent upon the person questioning such right by competent evidence to overcome the showing thus made.

ADVERSE USER—EVIDENCE.

65. Where a prima facie claim by adverse user is established by continuous use and application for the required time prior to suit the onus thus thrown upon the party thus contesting such claim is fully met by proof that within the statutory period the shortage in the water supply below the adverse claimant was not sufficient to substantially prejudice the interests of other appropriators from the source of water supply from which the appropriation is made.

PLEADING—INCONSISTENT DEFENSES.

66. Adverse possession and prior appropriation are not inconsistent defenses and both may be asserted in the same pleading.

ADVERSE POSSESSION—APPROPRIATION.

67. Where the pleader relies on adverse possession only and in his proof fails to sustain such defense and the evidence offered is sufficient to establish an appropriation it may be considered, and his rights under the doctrine of prior appropriation may be established in accordance with the showing thus made.

APPROPRIATION—NONUSER.

68. The right to the use of water can not be deemed forfeited on account of nonuser alone, short of the period prescribed by the statute of limitations for real actions.

WATER RIGHTS—"ABANDONMENT."

69. To constitute an "abandonment" of a water right there must be a concurrence of the intention to abandon and an actual failure in its use.

WATER RIGHTS—FORFEITURE.

70. Involuntary abandonment of real property can not work a forfeiture of any water rights previously initiated in connection therewith.

LOSS OF LANDS—CHANGING WATER USE.

71. Water rights initiated in the reclamation of lands lost to another, who had inaugurated a right to water for irrigation, can not change the use thereof to other lands; but he will be treated as having abandoned such right, where not to do so would work to the prejudice of other appropriators.

TRIAL—DISMISSAL—GROUNDS.

72. When one of the parties to the suit has not offered proof as to his rights and it does not appear that he is claiming a right to the use as against others whose interests are involved, the court may, in its discretion, dismiss without prejudice to him.

DISMISSAL AND NONSUIT—DISCRETION OF COURT.

73. Where the trial court properly orders all claiming and interest in matters before it to be made parties, and they appear, it may, in the exercise of its sound discretion, refuse to grant a motion for nonsuit, in which event their failure to further proceed may result in a decree against them on the merits; but the court may, if it deems proper, grant such motion, and, if granted, their rights will not be determined.

APPEAL IN EQUITY—DECREE.

74. While it is the general rule that, as to the interests of the parties to a suit in equity who do not appeal, a decree more favorable than entered in the trial court will not be entered, such general rule may not always be invoked where their appearance is not voluntary in the first instance, but made in response to an order of the court requiring all interested in the subject matter of the suit to be made parties.

WATER RIGHTS.

75. As between the parties whose rights are adjudicated, at all times that the water in controversy is not required by one or more, it must, when needed by others, remain uninterrupted and subject to their use.

WATER RIGHTS—APPLICATION.

76. All water rights are limited in their application to the number of acres and to the land for which acquired, except when the increase in the acreage or change in place of use will not work to the material prejudice of others interested in the stream diverted.

WATER RIGHTS—JUDGMENT.

77. Water suits are sui generis, concerning which all questions of practice are not provided for either by statute or precedent, for which reason courts of equity are not necessarily bound in all cases by the rules of practice usually invoked; and where parties are served with summons and by order of the court required to interplead with reference to each other, and any of them directly or indirectly act in disregard of the spirit of the order, the court, in the exercise of its sound discretion, may either enter a decree affecting their interests, or not, as it may deem just and equitable.

PLEADING—ADMISSIONS—EFFECT.

78. If, in violation of the spirit of the court's order requiring all interested to be made parties, for the purpose of avoiding the effect of such order, any parties neglect to frame issues, or in framing them between themselves make admissions in their pleadings which, to recognize and to follow, makes a decree impracticable of enforcement, the pleadings may be deemed amended to conform to the proof, thereby being within the general purview of the order of the court, and all admissions not in harmony with the proof and inimical to the enforcement of a decree may be disregarded.

APPEAL IN EQUITY—TRIAL DE NOVO.

79. Since, under the code, suits in equity are tried de novo on appeal, the court, except where limited by the statute, has the same discretionary power in reference thereto as the trial court.

SUPPLEMENTAL DECREES.

80. Owing to the difficulties usually encountered in the enforcement of decrees, where there are many conflicting interests in water suits, the trial court has the power, when deemed advisable, to enter such supplemental decree not inconsistent with the decree of the appellate court as may be necessary to make the decree of the appellate court effective.

COSTS—DISCRETION OF COURT.

81. Where it is clear from the evidence that a suit was made necessary by knowingly wrongful acts of one of the parties, costs should be taxed against him in favor of the parties directly injured thereby; but where it appears that parties to the proceeding are benefited by the general result arising from an adjustment of all conflicting claims on the stream, the court may, in the exercise of its discretionary powers under the Code in such matters, adjudge that each pay his own cost.

ON REHEARING.

ATTORNEYS—CHANGE OF.

82. Change of attorneys during trial not unusual. Courts can not consider same as ground for reopening the case, except extraordinary showing be made, which is wanting here.

DELAYS.

83. Where a court finds that delays incident would occasion more inconvenience than to disregard that feature the motion to reopen case because of change of attorneys, on unforeseen points considered by the Supreme Court, will be denied.

TESTIMONY—ESTOPPEL.

84. Testimony examined; found long delay due largely to interference by petitioner during the long period in which he received benefits of delay, as to much water not entitled to. *Held:* He is estopped to complain of unexpected change of attorneys and other unforeseen embarrassments arising during the interim.

TEST OF RIGHTS.

85. A person under claim by adverse possession can acquire no right to *more water than applied* to a beneficial use. Size of ditches is not the test. *The test is, how much* water was applied to a beneficial use.

EVIDENCE—STATEMENTS.

86. Statement in declaratory statement filed in making a desert-land entry as to water used is not conclusive, but the statement, as made, having recited that land was not previously irrigated, held strong evidence against subsequent contention of claimant to the contrary.

CONSTITUTIONAL RIGHTS.

87. To reopen the case, under the showing made, in view of the long delay and the death of parties and witnesses since the testimony was taken, would violate the letter and spirit of the constitution, article 1, section 10, of the State guaranteeing to all a speedy hearing in court.

COMPLAINANTS.

88. Since the only parties who could, under showing made, be injured are not complaining, reopening of the case must be denied.

PARTIES—OUTSIDE RECORD.

89. A showing urging reopening of the case, made by parties outside of the record, will not be considered. Parties not of record can not be prejudiced by the result of a decree in a case in which they have not been brought into court.

TRIAL—WRONG THEORY.

90. A case will not be reopened on the ground that litigants therein discovered for the first time on appeal that the trial was had in the court below on the wrong theory.

DRAGNETIC PLEADING.

91. Dragnetic system of pleading, here used, appears not unusual in this class of cases, and causes of this class will not be remanded by reason thereof.

MAXIMUM—MINIMUM ALLOWANCES.

92. Beneficial use being the measure of the right to the use of water, it is not required that the same quantity per acre be awarded all parties to the suit. Maximum and minimum allowances come within the spirit of the law of waters.

SUPPLEMENTAL DECREE.

93. Supplemental decree may be provided for to meet unexpected emergencies.

COSTS—REDUCTION.

94. Facts regarding cost bill filed, and same reduced from $2,046.70 charged against Small, and judgment limited to costs on appeal.

EAKIN, J. (concurring).

STATUTORY PERIOD.

95. Facts examined disclose that although Small claimed, both as prior appropriator and adverse user, the inception of his interference of others' rights beginning in 1895, the full statutory period had not elapsed, and he must accordingly rely on his claim as prior appropriator only.

HOUGH ET AL. v. PORTER ET AL.

Opinion by King, C. (commissioner Sup. Ct. Feb. 23, 1907; appointed associate justice, Feb. 12, 1909):

The principal contention of appellants as first urged was that the court acted without jurisdiction in directing that all persons interested in the lands bordering on Silver Creek, its tributaries and channels, be made parties to the suit, and that such action on the part of the court constituted reversible error. These questions of practice, with matters incidental thereto, were determined adversely to counsel's contention (95 Pac., 732), and the cause was set down for further argument on the main points involved, principal among which is that of riparian rights, as affected by the act of Congress of March 3, 1877, known as the desert-land act (*ib.* 732). This question and the points formerly determined were fully discussed at the reargument. After a reconsideration of the questions of practice presented we find no reason to depart from the conclusions announced in our former opinion.

11. We come then to a consideration of the desert-land act, as to its effect upon the parties hereto owning lands upon the streams involved, the rights of each of whom have attached since the passage of the act. This confronts us with the legal problem as to whether any are riparian owners; and, if so, to what extent and what bearing their claims as such have upon the water rights in question.

It has become a matter of history that prior to any laws upon the subject the use of water was exercised under a custom permitting any person to go upon a stream, or other source of water supply upon the public domain, and divert water therefrom wherever and whenever needed, provided the use thereof did not interfere with the prior rights of others. In other words, priority in the diversion and use determined the rights of all conflicting claimants. This procedure was encouraged and acquiesced in by the Government for many years throughout the Pacific Coast States, until in recognition thereof the act of Congress of July 26, 1866 (7 Fed. Stat. Ann., 1090; U. S. Comp. Stat., 1901, 1437) was adopted, which provided: "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed * * *." This act constituted a recognition of preexisting rights rather than a creation of any new one, and accordingly recognized and assented to appropriation of water in contravention to the common-law rule as to continuous flow. (Broder *v.* Water Co., 101 U. S., 274; United States *v.* Rio Grande Irr. Co., 174 U. S., 690; Gutierres *v.* Albuquerque Land Co., 188 U. S., 545; Davis *v.* Chamberlain, 51 Oreg., 304; 98 Pac., 154.)

12. Supplemental to the above act, provision was made by Congress, July 9, 1870, for incorporating a reservation in favor of such rights in all patents when issued, as follows: "All patents granted, or preemption or homesteads allowed shall be subject to any vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights, * * *." (Rev. Stat., sec. 2340; U. S. Comp. Stat., 1901, 1437.) This was followed on March 3, 1877, by what is known as the desert-land act, parts of which, in so far as material to this discussion, are:

"That it shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such,' and upon payment of twenty-five cents per acre to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights * * *." (19 Stat., 377; 6 Fed. Stat. Ann., 392; U. S. Comp. Stat., 1901, 1548.)

The title of the foregoing act reads "An act to provide for the sale of desert lands in certain States and Territories." Being an act of Congress, it is well known that it is not required that the title of the act embrace all its provisions. And, while a different rule prevails in some of the States, it is probably an exception rather than the rule that acts of Congress are limited to matters contained in their title. This being the rule which prevailed in Congress, we have only to look to the body of the act to ascertain its intention.

13. After providing for the reclamation of arid lands and for the procuring of title thereunder, it will be observed that in this act, as essential to the reclamation of lands, the water right, when located by the persons taking the land, shall depend upon bona fide prior appropriation. The reason for this is apparent; the object and purpose of the act was by this method to reclaim, develop, and make productive arid lands or those of a desert character, which, as a rule, were nonriparian.

For many years it was an open question whether lands through which streams flowed in the natural channels were subject to reclamation under this act. (Sims *v.* Phalen, 11 L. D., Dept. of Int., 206.) But it was finally determined that such lands could be reclaimed where clearly shown to be of a desert character. (Houck *v.* Bettelyoun, 7 L. D., 425; Nilson *v.* Anderson, 23 L. D., 139.) Considering this feature with the then long-existing conditions in reference to the public lands throughout the West, the reasons for providing that the water rights should be acquired under the doctrine of prior appropriation are obvious.

This first act (1866) refers to priority of possession and local customs, rules, regulations, etc., to which rules of construction were soon applied, the outcome of which depended largely upon whether the decisions were by courts in localities of a strictly arid nature or in the humid States. If in a strictly arid section, the doctrine of prior appropriation prevailed; while, if humid, a middle ground, or what is called the "modified doctrine of riparian rights," appears to have been the one adhered to and deemed the most conducive to the public welfare. Near the time of the passage of this act conflicts had arisen from the application of the law, as applied to riparian rights, in the arid and semi-arid West. In California the effect thereof on riparian rights was involved in much doubt and not fully determined, while in Nevada the noted case of Vansickle *v.* Haines (7 Nev., 249) had been decided, adhering to the common-law rule on the subject. This latter case, however, was subsequently overruled, since which time the doctrine of prior appropriation has there prevailed. (Jones *v.* Adams, 19 Nev., 78; Reno S. Works *v.* Stevenson, 20 Nev., 269; Walsh *v.* Wallace, 26 Nev., 299.)

The act of 1866 had left somewhat in doubt not only the question of its effect upon riparian rights, but an uncertainty whether it thereby intended to establish a permanent rule upon the subject. And the act of 1870, requiring reservations in all patents issued, by inserting a statement therein to the effect that the patents were executed subject to vested and accrued water rights, etc., was evidently intended as a precautionary measure to remove doubts then extant as to the legal effect of any patents subsequently issued, so far as applicable to any rights acquired before the date thereof.

In order, therefore, to remove such doubts and to establish a uniform rule throughout the States mentioned in the act, whereby all appropriations made from streams flowing through public lands over which Congress had power to legislate, after the provisions specifying the manner in which lands taken under the act could be reclaimed, there was added the clause:

"And all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." (19 Stat., 377; U. S. Comp. Stat., 1908, p. 1549.)

This reservation of water rights for the benefit of the public was clearly not essential to any of the other provisions of the act. The previous statement contained sufficient to define and protect the rights of those selecting lands under the desert-land act, but the added proviso, or something of similar import, was essential to the establishment of a clear and uniform rule upon the subject as regards all appropriations thereafter to be made from streams or other bodies of water upon the public lands and to which such might be riparian.

The words "shall remain and be held free for the appropriation and use of the public for irrigation," etc., are clearly words of reservation and dedication, and obviously so intended. It is insisted, however, that the language quoted is insufficient for either a grant, trust, or dedication; that a grant presupposes a grantee capable of receiving it; that it is not a trust because all three essentials necessary to constitute a trust, i. e., trustee, trust res, and cestui que trust, are wanting; that it can not be held to be a dedication, in that the right there alluded to is not an easement but is usufructuary only, partaking of the nature of real estate—an incorporeal hereditament, analogous to a "profit" in land, in that it depletes the riparian right. It is further observed that a dedication is not a grant and can not arise by grant since it exists in favor of the entire public, in respect to which it was asserted, as above stated, that it can *not become* a grantee.

14. A dedication is defined as being in the nature of a gift, inuring to the *benefit of the public* as a grant, but differing from a grant in that no grantee

in esse is necessary to its validity. (9 Am. and Eng. Ency. Law, 21; 13 Cyc., 439.) It consists of devotion or giving of property for some proper object and in such a manner as to conclude the owner. (State ex rel. Sims *v.* Otoe County, 6 Nebr., 129, 133; Patrick *v.* Y. M. C. A., 120 Mich., 185, 193; 79 N. W., 2080.)

15. A "reservation" as here used is something taken from the whole thing, covered by the general terms making the grant, and cuts down and lessens it (or act, under which title to the res from which the reservation may be made) from what it would be except for such reservation. (Words and Phrases, 6140; Weynand *v.* Lutz, Tex. Civ. App., 29 S. W., 109.)

16. The latter term applied here: The National Government by its various laws relating to public lands granted to its citizens the privilege of acquiring title thereto. Construing all together as one act, the desert-land act by the language used appears to reserve therefrom to the entire public the right of any citizen after March 3, 1877, to divert, use, and acquire a right in and to the unappropriated waters flowing through, or adjacent to, any lands thereafter patented, such right to be determined by priority. Reservations of this class may be found in Calhoun Gold Mining Co. *v.* Ajax Gold Mining Co. (27 Col., 1; 59 Pac., 607, 615; 50 L. R. A., 209; 83 Am. St. Rep., 17), Wilcox *v.* McConnel (13 Peters, U. S., 498), Wilson *v.* Higbee (C. C.; 62 Fed., 723).

17. It would not be seriously questioned that such a reservation might be expressly and effectively made in a deed or other evidence of title. Then, when we take into consideration that to determine the extent of the title received through a conveyance of any kind from the Government, whether by grant, patent, or otherwise, we must look into all acts in force in reference to the lands intended thus to be conveyed, to ascertain what interest remain subject to transfer, it becomes manifest that there is no difference in principle between a reservation resulting from an act in force at the time and an express reservation in the instrument itself through which title may be asserted.

18. It would seem, however, that as to what may be the proper term by which any interest thus reserved may be designated, we need not inquire. Nor is it material whether any term has been recognized or established by the courts to cover the privileges and rights reserved or surrendered by the Government to the public, or individuals of which the public is composed. Our form of government, Constitution, and powers reserved to the Government, have necessarily given rise to privileges and rights not fully covered by the common law or by the terms in common use under it.

The right of the Government to dispose of its public lands, and to deal with all rights incident thereto in such a manner as it may deem best, has long been fully established and recognized by all decisions upon the subject. True, it can not by legislation determine for any State, after its admission, what the local laws relative to riparian rights shall be (United States *v.* Rio Grande Irr. Co., 174 U. S., 690, 703), but the General Government in dealing with its public lands may provide for their transfer as might any other landed proprietor, and make such reservations therefrom by grant, dedication, or otherwise, as it may see fit.

19. Riparian rights may become the subject of a grant or dedication and may be severed from the soil. (Coquille Mill & M. Co. *v.* Johnson, Oreg., 98 Pac., 132.) This principle is clearly and concisely stated in an opinion by Knowles, district judge, in Howell *v.* Johnson (C. C.; 89 Fed., 556, 558), as follows:

"Being the owner of these (public) lands, it has the power to sell or dispose of any estate therein or any part thereof. The water (in question) in an innavigable stream flowing over the public domain is a part thereof, and the National Government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

Decisions to the above effect are too numerous and too well understood to need extensive citation.

By the homestead and other land acts Congress granted to the citizens of various States and Territories the right at any time hereafter, to enter upon the public domain and to select a quantity of land, in the manner there specified, and of thereby securing a home, notwithstanding no certain individual was designated to accept and receive such title. The effect of these acts was that the grantor of the public lands, the National Government, was to hold these lands in trust for the public, to be acquired by any qualified citizen thereof, on compliance with the rules prescribed. Numerous grants in praesenti were also made, to be held in trust by States designated in such grants for any company, person, or persons who might construct any wagon or other roads there indicated. For example, a grant was made to the State of Oregon of

alternate sections of public lands, designated by odd numbers, three sections per mile, to be selected within 6 miles of what was, at the time of the passage of the act, an imaginary road between two given points within the State, upon the doing of certain acts thereafter to be performed; thus reserving to the builders, if any there might be, the right to select the odd sections desired. (14 Stat., p. 89, c. 174; Cahn v. Barnes, 5 Fed., 326; United States v. Dalles Military R. Co. and 7 others, 140 U. S., 599; United States v. Willamette V. & C. M. Wagon Road Co., 42 Fed., 351; United States v. Willamette V. & C. M. Wagon (C. C.); 55 Fed., 711.) Such a road in time became a certainty; and more than 30 years after the passage of the act lands were selected, in reference to which it has been held that upon selection thereof the right thereto relates back to the date of filing the map of definite location of the road, shutting out all intervening claims and settlements, regardless of patents issued to settlers thereon during the meantime—and this, too, notwithstanding such policy was instrumental in holding in abeyance and withdrawing from settlement large tracts of the public domain for more than a quarter of a century. (Eastern Oregon Land Co. v. Brosman (C. C.); 147 Fed., 807.) Any settlers on such lands are held to have entered thereon with full knowledge of the law and to have taken them subject to the "contingent interests" in the land of such possible road of such company as might become the beneficiary of the grant. (Altschul v. Gittings (C. C.); 102 Fed., 36, 38.)

Another and more apt illustration is that of the policy of the National Government respecting its mineral lands, in regard to which any one acquiring title to any part of the public domain under the homestead or under any other act takes such land subject to the exception that he does not acquire title to the minerals known to be therein at the time of entry or of patent, whether located for minerals at the time of the inception of the rights of its grantee or not. (5 Fed. Stat. Ann., secs. 2318, 2319; U. S. Comp. Stat., 1901, pp. 1423, 1424; Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 27 Col., 1.)

20. It was in the exercise of a similar prerogative on the part of the Government that there was, by the act of 1877, given to the public or to any individual thereof the right to appropriate and apply to a beneficial use the waters flowing through its public domain. No limit as to the time in which this right may be exercised is made, except in effect that he who first diverts the water and with due diligence applies it to the uses there enumerated is given the better right thereto. It can make no difference, therefore, whether it be termed a grant, reservation, dedication, trust, or other privilege.

21. This unquestioned power of the owner over the public domain was exercised, and anyone entering upon and acquiring title to any part of the public domain after the passage of this act accepted such land and title thereto with full knowledge of the law under which the patent was issued, the import thereof being that this right incident to the soil was reserved by the Government to be held in trust for the public; and that he who first applies the water to a beneficial use shall become the owner of the right thereto; and that the recipient of such title takes it subject to that right, which he, in common with others of the public, is privileged to exercise. It is elementary that the grantor can convey no greater title than he has. This rule as applied to cases of this nature is clearly and concisely stated in Hume v. Rogue River Packing Co. (51 Oreg., 237; 92 Pac., 1065, 1067). There the plaintiff was owner of a grant from the State, either directly to himself or by mesne conveyances to others, of all the tidelands bordering upon the river, as well as of all the uplands adjacent to the river above tidewater, the title to which was acquired from the United States, and the description of which ran to the meander lines. In discussing this feature, this court, by Slater, C., says:

"He has no title by express grant from the State to any part of the bed and stream as such, but he does claim title to the entire bed of the stream at the mouth of the river, where, by reason of the shifting of the channel of the river from north to south, and vice versa, and by successive purchases from the State as tideland of the uncovered sands on both sides of the river, his deeds overlap, and apparently, at least, he is at that point of the river the owner of the bed of the stream, but this fact, we apprehend, will be of no avail in support of his claim of ownership of the water when flowing over such land, for in any event he could acquire no greater rights thereby than would be given the ordinary and legal effect of such deed by virtue of the statute authorizing its execution and delivery."

22. It is true that the act of 1870 made it necessary to insert in the patents a *reservation of* all vested and accrued water rights, rights of way, etc., as well

as to make similar reservations in patents respecting minerals; but, as stated, so far as a legal effect of the reservation is concerned, such would have been unnecessary, in that the Government could grant no greater right than it had. Acts of this nature, like those requiring patents to be issued for lands acquired under railroad and other grants, under which title passes by virtue of the acts granting the lands, are but supplemental legislation. In this manner the evidence of title may more conveniently be placed of record and thereby add to the convenience, in many respects, of the holder of the title, but otherwise adds nothing thereto. (Cahn *v.* Barnes (C. C.), 5 Fed., 326, 331; Pengra *v.* Munz (C. C.), 29 Fed., 830, 835; Langdeau *v.* Hanes, 21 Wall., 521; United States *v.* Dalles Military R. Co., 140 U. S., 599; also cases cited in 8 Rose's Notes (U. S.), 486.)

A good illustration of the power of the Government or other landed proprietor, at all times and whenever desired by it, to grant, reserve, or dedicate a right to anyone at any time to acquire title to all or to any part of its public domain in such manner as it might designate—either to the land itself or to the incorporeal rights appurtenant thereto, whether an easement over it the removal of the minerals, of the timber, or of the right to the use of all or any of the waters flowing through or adjacent to such land—may be found in the recent case of United States *v.* Winans (198 U. S., 371). In that case a suit was brought to enjoin the owners of certain lands on the Columbia River from interfering with the exercise by the Indians on the Yakima Indian Reservation in the State of Washington of fishing rights and privileges over, on, and adjacent to lands along the Columbia River patented to the defendants therein, which rights were claimed under the provisions of a treaty made in 1859 between the Indians and the United States. This treaty reserved to them the exclusive right to fish in all streams running on and within certain lands within prescribed limits, and to fish in common with the citizens of the territory at all accustomed places in the vicinity, and further secured to such Indians the right of way over all lands necessary for carrying such reserved rights into effect, together with the privilege of erecting on any of the then public lands temporary buildings for the curing of fish. Subsequently the lands between the Columbia River and the special tract set aside and known as their reservation were entered by citizens of that State, and patents, without reservations therein of any kind being issued to them. Grants from the State of Washington to the shore land fronting the patented lands were also procured by the patentees, together with licenses from the State to maintain devices for taking fish, called "fish wheels." By virtue of these patents, grants, and right thus acquired by the landowners it was maintained that they could preclude the Indians from fishing along the shores and from crossing the patented lands for that purpose, in respect to which it was argued that the Indians, under the rights reserved to them and recognized by the Government in the treaty, acquired "merely an executory license or privilege, applying to no certain and defined places, and revocable at will of the United States, to fish, hunt, and build temporary houses upon public lands, in common with white citizens, upon whom the law has conferred no title by occupancy whatever." These contentions were sustained by the United States circuit court in that State (United States *v.* Winans, 73 Fed., 72, 74), Judge Hanford, inter alia, observing:

"The theory that lands conveyed by Government patents, after being so conveyed, and appropriated by individual citizens, still remain subservient to use and occupation by the Indians for travel over the same, otherwise than by lawfully established public highways, and for camping grounds, finds no support in the provisions of the treaty, nor in the rules for the construction and interpretation of statutes, which must be applied in the interpretation of the treaty and of the public land laws of the United States." But on appeal to the United States Supreme Court this decision was reversed (198 U. S., 381), the court holding, in substance, that, notwithstanding patents were issued to the lands by the Government, the patentees took the same subject to the rights reserved to the Indians thereafter to fish along the shores of the Columbia River, including a right to erect temporary structures for that purpose, and to retain such easements as would enable the privileges thus reserved to be executed. In discussing the effect of the patents the court say:

"The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries

reserved 'in common with citizens of the territory.' The Land Department could grant no exceptions from its provisions. It makes no difference, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land."

23. It is clear from the foregoing decision (1) that whether the landed proprietor be the Government, a tribe of Indians, or other owner, such proprietor may reserve or grant a right or interest in, over, and appurtenant to, or in any manner connected with, its lands, not necessarily to an individual alone, but to a class of individuals in general as well as in particular, without limit as to time, application, and use of the rights or privileges thus reserved, dedicated, or granted; (2) and such right or interest in its public lands becomes effective in favor of those for whom it may be reserved, or to whom it may be dedicated, and against those subsequently acquiring title thereto, even though such rights may not be exercised until after the lands shall have been patented to others; (3) and that in so far as the binding effect thereof is concerned upon such subsequent purchaser it is immaterial that such reservations or exceptions are not specified in the patents or other instruments of conveyance.

24. Reservations of this class are fully and ably discussed by the Supreme Court of Kentucky in Rowan's Executors *v.* Town of Portland (8 B. Monroe, 232). The Supreme Court of New Hampshire, in the case of State *v.* Franklin Falls Co. (49 N. H., 240, 256), declines either to agree with the reasoning of that court or to follow the rule there enunciated, but the United States Supreme Court, in Morgan *v.* Railway Co. (96 U. S., 716), clearly adopts the reasoning applied by the Kentucky court and observes that the consideration there given those questions is a full, able, and correct exposition of the law on the subject, with which conclusion we concur. In Rowan's Executors *v.* Railway Co., supra, the dedication related to certain streets adjacent to a stream and included the right of wharfage or right to land boats and other vessels along that part of the street bordering upon the river. The court, in discussing the legal effect thereof, concludes that the grantor holding title subject to the use to which it was dedicated held the title thereto in himself as trustee for the public, which his grantee took subject to such trust, and further observes:

"Whether the public at large was or could be the immediate grantee or recipient of this right we should consider it fruitless to inquire. The potential right of use in and by the public was created by the sale and conveyance of the lots. And whether it passed at once to the public or remained in abeyance or is the mere result of an estoppel or vested in the purchasers of lots as a part of the estate conveyed to them, it was in either case alike perfect and beyond the future control of the original proprietor or his alienees of the title on which this right of use was engrafted."

Again, as stated in Pearsall *v.* Post (20 Wendell (N. Y.), 111, 119):

"It seems to be well settled by the Supreme Court of the United States, by several courts in the neighboring States, to which we may perhaps add the court of chancery in this State, that dedications of land for religious and charitable purposes, as well as for public ways and squares, commons, parks and other easements in nature of ways, are to be upheld, although there be no person in esse capable of taking as a grantee at the time. It was remarked by Mr. Justice Thompson, in Cincinnati *v.* White's Lessee (6 Peters, 429, 436) that 'the principle, if well founded in law, must have a general application to all appropriations and dedications for public use where there is no grantee in esse to take the fee.' He adds, 'This forms an exception to the rule applicable to private grants and grows out of the necessity of the case.' These remarks comprehend every conceivable case where a man has furnished evidence of a clear intent to give up his real estate for the purposes of any legitimate public use.

Privileges of this class were not unusual and were recognized as being subject to dedication in the early history of the law on the subject, as disclosed by further remarks therein of the same court, namely:

"I pass over the more usual instances of easements, such as ways, commons, and water privileges, etc., enjoyed either by individuals, towns, or other corporations. * * * We may also pass over those which are less common, and one put by Mr. Justice Thompson (6 Peters, 437), from McConnell *v.* Lexington (12 Wheat., 582), the reservation of a spring of water for public use. It was made to a corporation which might turn the spring to its own or public purposes. Thus the user was invoked to establish an individual right. A like case is mentioned in Co. Litt. 56 a., a customary watering place in the Inhabitants *of* Southwarke, for violating which an action was held to lie."

In the spring case alluded to it appears that the Commonwealth of Virginia in 1773, by an act known as the land law, reserved 640 acres of land, upon which the spring was situated, for the benefit of those who had settled in a village or city, afterwards to be laid out into lots and divided among such settlers. The spring was in common use by the inhabitants of a village located on this tract and afterwards claimed by one of the purported grantees of the lot upon which it was situated. The court, however, in an opinion by Mr. Chief Justice Marshall, held that the use of the spring by the public and the recognition thereof for a long period of time constituted such a dedication; and that even though the claimant thereof be considered the grantee of the land upon which the spring was situated, its use for the purposes mentioned, although no reservation was made in the deed, must be deemed to have been reserved. It may be said that in that case the entire public exercised the right to the use of the spring thus dedicated, but it must be remembered that the exercise of this right was merely by the individuals constituting the public.

25. In the case at bar the public exercises the right in a somewhat similar manner, except on a larger and more extensive scale, in that an appropriation by any individual or corporation gives it a right in and to the flow and use of the water appropriated for the purposes for which it is diverted, which right may afterwards be subject to sale and transfer. But it is clear that, if a dedication can be made to the public of a spring or a stream in the manner indicated in the last case quoted, the owner of any source of water supply may make a like dedication in that or in any other manner determined upon. The manner of making the dedication, as well as its legal effect, must be determined from the act or instrument by which it is made. In the case under consideration it will be observed that the language used is that the surplus waters of the streams and of other sources of water supply designated shall remain and be held free for the appropriation and use of the public for (1) irrigation, (2) mining, and (3) manufacturing purposes. The manner of appropriating and using the water for irrigation, manufacturing, and mining purposes was at that time and has been at all times since well understood; hence the use by the public and manner thereof is specified, meaning, when interpreted in the light of the then existing facts, the usual manner of applying it for power purposes and of diverting it by means of ditches and other systems in use for irrigation, including also the usual methods in use by miners.

26. It follows that the rights reserved to the public and dedication of the surplus waters therefor were intended for use in that manner. Construed then with the act of 1866 and other provisions of the act of 1877, we are of the opinion that all lands settled upon after the date of the latter act were accepted with the implied understanding that (except as hereinafter stated), the first to appropriate and use the water for the purposes specified in the act should have the superior right thereto.[1]

So far as we are able to determine, the question as here presented, has not heretofore been squarely before any of the courts. But, while not deemed essential to an adjudication therein, we find the act of 1877 considered to some extent in the following cases: Williams *v.* Altnow (51 Oreg., 275; 95 Pac., 200), Farm Investment Co. *v.* Carpenter (9 Wyo., 110; 61 P., 258; 50 L. R. A., 747), United States *v.* Conrad In. Co. (C. C.; 156 Fed., 123, 128), United States *v.* Rio Grande Irr. Co. (174 U. S., 690), Gutierres *v.* Albuquerque Land Co. (188 U. S., 545), Kansas *v.* Colorado (206 U. S., 46), State ex rel. Liberty Lake Ice Co. *v.* Superior Court, Spokane County, (47 Wash., 310; 91 Pac., 968).

In the first case mentioned, Altnow, who was the proprietor of the land upon which Warm Springs Creek had its source, claimed both as a prior appropriator and as a riparian owner. To his riparian claim it was maintained as a defense that his lands were settled upon after the date of the desert-land act, for which reason he was not a riparian proprietor in the sense that as such alleged riparian owner he could assert a right in the stream for irrigation; and this contention was in that case expressly upheld by the trial court. On this point Mr. Chief Justice Bean observes that Altnow's claim as riparian proprietor (all other parties therein being in the same position in this respect) could not be upheld for two reasons: (1) That he relied upon his claim as prior appropriator and was bound by it; (2) that the lands having been entered since the year 1877, "it is a serious question whether the desert-land act does not abolish the so-called modified doctrine of riparian rights, which gives to riparian proprietors

[1] See Boquillas Land & Cattle Co. *v.* Curtis (212 U. S.; 20 U. S. Sup. Ct. Rep., 494), citing this *case on above point.* Reporter.

the right to use water for irrigation as to all lands through which nonnavigable streams flow the title to which has been acquired from the Government of the United States since the passage of that act." And after quoting from the act, he further remarks:

"The Government of the United States, as the primary owner of the soil, undoubtedly has the right to make such provisions concerning the waters of nonnavigable streams thereon, as it deemed proper, and it is at least a debatable question whether, by the language quoted, Congress did not intend to recognize and assent to the appropriation of such waters in contravention to the common-law doctrine of riparian rights as to persons subsequently acquiring title from the United States." (United States *v.* Rio Grande Irr. Co., 174 U. S., 690).

In Wyoming the doctrine of priority of appropriation for beneficial use in contravention to the common-law rule on the subject prevails. By legislative enactment in 1886 the water of every natural stream in that State was declared to be the property of, and dedicated to the use of, the public. The manner of appropriation and acquirement of such rights are specified, included among which priority of appropriation for a beneficial use was declared to give the better right. It is thus evident that without the provisions of the desert-land act the court there held, and was bound to adhere to that doctrine. But in Farm Investment Co. *v.* Carpenter (9 Wyo., 110; 61 Pac., 258), Mr. Chief Justice Potter, in discussing the question as to whether an express constitutional or statutory declaration was necessary in the first instance to render the streams and other natural bodies of water the property of the public, and subject to the control of the laws of the State, without reference to riparian rights, says:

"If any consent of the General Government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by Congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877. Those acts have been too often quoted and are too well understood to require a restatement at this time at the expense of unduly extending this opinion."

In New Mexico Territory, where the doctrine of prior appropriation also prevails, a similar question to that in the Wyoming case came before the court in Gutierres *v.* Alburquerque Land Co. (188 U. S., 545). The question there involved the validity of a Territorial act permitting the construction of canals and condemning rights of way, etc., in reference to which it was urged that the Territorial act was invalid because it not only assumed to dispose of the property of the United States without its consent, but was in conflict with the legislation of Congress, and therefore void. It was there argued that the waters affected by the statute were public and exclusively the property of the United States, but the statute alluded to permitted private parties and corporations to acquire the unappropriated waters in violation of the right of the Government to control and dispose of its property wherever situated. In considering this feature, Mr. Justice White, speaking for the court (23 Sup. C., 341; 47 L. Ed., 588), at page 522 of the opinion, observes:

"Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, particularly referred to in the opinion of this court in United States *v.* Rio Grande Irrigation Co. (174 U. S., 690, 704–706), the objection is devoid of merit. * * * By the act of March 3, 1877, chapter 107, Nineteenth Statutes, page 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that 'all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.'"

27. In United States *v.* Rio Grande Irr. Co., the inquiry was as to the navigability of the Rio Grande River and to the effect a proposed dam therein would have on navigation. While it was there unquestioned that the common-law rule was that every riparian owner was entitled to the continual flow of the stream, and that States and Territories had the power to change this rule and to permit the appropriation of the flowing waters for such purposes as they deemed wise, the court states that this power "is limited by the superior power of the General Government to secure the uninterrupted navigation of all

streams within the limits of the United States." It was urged in this connection that the desert-land act of 1877 also included therein the right to appropriate the waters of any stream, even though the depletion caused thereby should impede navigation. In the opinion the desert-land act, together with that of the acts of 1866 and 1891, are referred to, concerning which the court, by Mr. Justice Brewer (174 U. S., 706; 19 Sup. Ct., 43 L. Ed., 1136, p. 776), comments as follows:

"Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of exising facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries."

These appear to be the only cases in which the attention of the court has been called to this act, the plain inference from which is that in the opinion of the eminent jurists quoted, the act of March 3, 1877, was such a reservation by the National Government to and for the public and such dedication thereto of all its rights in and to all the waters flowing through its public lands for irrigation, manufacturing, and mining purposes, as to abrogate the modified common-law rules upon the subject, in so far as applicable to all lands entered after that date.

But the effect of the language of the act that "there shall remain and be held free for the appropriation and use of the public for irrigation," etc., we think, while constituting words of reservation and dedication, limits the rights thereunder to the deprivation of the riparian lands of the water, only, in so far as it may be claimed by the riparians for the purposes there enumerated. One of the rights inseparable from the land has always been that the owner of such land was entitled to an adequate supply of water flowing over it for domestic use, together with sufficient for the domestic animals necessary for the proper subsistence and maintenance of the landed proprietor and his family. This necessary use, no doubt, gave rise to the doctrine of riparian rights in the earliest development of the law upon the subject, followed by requirements for navigation, next extended to include the right to its use for power purposes, and later to the production of such garden and grains as was essential to the subsistence of the family of such riparian owner. At first the right of all riparians was evidently restricted to the demands upon the stream for the first purposes named. Lastly, as civilization progressed and extended over the semi-arid sections throughout the different nations the riparian demands accordingly became more extensive and enlarged to include irrigation, but limited at first, no doubt, to the watering of such garden and other produce reasonably necessary for the riparians' domestic consumption, and as the strictly arid localities became populated, by reason of the correspondingly increased commercial, agricultural, and mining development, this right was finally extended to include the irrigation not only for the limited purposes mentioned but to the watering of large areas in the production of grains and other agricultural products, together with its expansion thereof to include all its present uses.

28. The language used in this act was clearly intended to change the rule respecting the right of riparians to the use of water for irrigation, mining, and power purposes; but as in the last case cited it has its limits. It does not go so far as to affect the rights originally giving rise to the doctrine of riparian rights; that is, for domestic use, including the watering of domestic animals and such stock as may be essential to the sustenance of the owners of lands adjacent to the streams or other bodies of water. And as held in the last case cited, although abrogating the common-law rule on the subject, the act was not intended to permit appropriators to deplete the flow to such an extent as materially to impair the navigation of the rivers to which such streams directly or indirectly may be tributaries. The reason for this is plain; to permit an inter-

ference with navigation would be to deprive the entire public of a valuable right which at all times has been recognized as paramount to that of the individual desiring such interference; while to permit an appropriation of water depriving the owner of the land through which it may flow of its use for irrigation affects such person only. So far as the Government may be concerned by the depletion of a particular tract of land of such benefit, if any, it is recouped by the reclamation of a like tract for which the diversion causing the injury may be made.

29. However, it can not be presumed that it was the intention of Congress to render the soil absolutely worthless by drying the lands by diversion of the waters flowing through them to nonriparian lands as to leave the soil without the water essential to the owner's domestic needs. Presumably the best possible results for all concerned was intended, which it is clear could best be obtained by permitting the settler to retain the quantity of water essential to the sustenance of his family and to other natural wants incident thereto, but if he does not see proper to apply it to any of the uses specified in the act, then to permit the first home builder on other lands to make such use of it as will bring into cultivation the lands not adjacent to the streams, thereby protecting the settlers upon both classes of lands, and at the same time not only encourage home building but enable the Government to dispose of more of its lands, and to enhance its revenues proportionately.

30. It often happens that an owner of lands in arid districts does not want to farm them, but merely wants a home where he may raise stock or engage in other pursuits, requiring only sufficient water supply to meet the natural wants incident thereto and for which no artificial diversion or application of the stream may become necessary. It will not, therefore, necessarily be presumed that such settler intends to irrigate his lands or that he will ever demand the water for such purposes, for which reason Congress evidently intended by the language used in the act of 1877, that if desired for such purposes some manifestation thereof, by diversion or other sufficient notice, should be given, and if not desired for the reclamation of his lands, that the owner should not be permitted to complain if another shall so apply it.

But as regards the requirements for domestic use, the settlement, or other steps taken looking toward the procurement of title thereto, gives ample notice that the water for all necessary domestic uses is, and will continue to be, demanded as appurtenant to the land entered, as much so as would a diversion of the water for such purposes; while if intended to be appropriated for irrigation, mining, or power purposes, some affirmative action in that direction is essential, and it is but reasonable to require a clear manifestation of an intent or notice thereof. This requirement is vital to the initiation of such a right, for the same reason that some notice is exacted for the entry of the land itself. Congress could reasonably presume that if an appropriation were desired for the purpose mentioned in the act some steps would be taken manifesting such intent, and that if the owner is not the first to move in that direction the person making an application thereof to a beneficial use within a reasonable time ought to be rewarded for his diligence, and he is entitled to have his rights in that respect recognized and protected. For this reason the settler who has acquired title to the land through which any stream may flow took it subject to the rights of the person who has or who may subsequently make the first use of such stream for the purposes enumerated in the act, excepting only as to the natural wants and needs of such settler.

31. Our attention is called to references in our statute to riparian rights (B. and C. Comp., secs. 4994, 5000), which, it is argued, recognize the doctrine of riparian rights as being in force in this State, regardless of the act of Congress under consideration. It could with equal strength be maintained that section 5002 (ib.), which provides that "all controversies respecting rights to water under this act shall be determined by the dates of the appropriations as respectively made by the parties," constitutes a declaration to the effect that the doctrine of prior appropriation shall prevail.

The statute does not attempt to define riparian rights nor to determine the extent or effect of the doctrine as applied to irrigation. tI has reference only to such rights as such riparian owner as the proprietor may have, whatever they may be; and the question as to what such rights are, and since 1877 have been, is the one under consideration here. Owners of land adjacent to bodies of water have riparian rights other than those presented in this controversy. (See Morton *v.* O. S. L. Ry. Co., 48 Oreg., 444; 87 Pac., 151, 1046; Coquille *Mill & M. Co. v. Johnson* (Oreg.), 98 Pac., 132.) As hereinbefore held, the act

of 1877 only affects riparian rights to lands the title to which has been acquired since that date, and then only in so far as a claim to the use of water may be asserted, as riparian owner for the purposes in the act enumerated. And in this connection it will be observed that section 5000, B. and C. Comp., protects the owner contiguous to the stream, as against those claiming under the act of which that section is a part, in his right to the flow of the stream to the extent required for household, domestic, and other uses incident thereto, with sufficient quantity for irrigation purposes to the extent then actually needed and in use. An exception to that extent is accordingly made in favor of the landowner as against, and only to the extent of, such rights as may be asserted under the act.

Our attention is called to Sturr *v.* Beck (133 U. S., 541). That was a controversy between a riparian owner and a subsequent, but prior, appropriator, and was submitted on an agreed statement of facts. Based upon these stipulations, the trial court made findings, among which was that the defendant's first settlement upon his land through which the stream flowed was in March, 1877, and that he made a homestead filing thereon on the 25th of the same month. Those findings were conclusive upon the appellate court. The date alluded to does not disclose whether the settlement was prior or subsequent to March 3, 1877, the date of the desert-land act.

Owing, therefore, to the uncertainty as to the date of settlement this decision can not be held in point. And the further fact that no reference appears as to the exact date clearly indicates that either the settlement was made before that date, or that the question did not occur to the litigants and was accordingly not urged before the court, nor considered by it. But whatever view may be taken in this respect, its bearing on the question at hand is practically disregarded, if not overruled, by that court in its declaration on the subject through Mr. Justice Brewer, in United States *v.* Rio Grande Irr. Co., above quoted, as well as in the general reference to this act by the same court in an opinion by Mr. Justice White, in Gutierres *v.* Albuquerque Land Co. (188 U. S., 545). To the extent, therefore, that Sturr *v.* Beck may be deemed a precedent, as regards riparian rights, its weight is materially lessened, if indeed the rule as there and previously enunciated on the subject is not overruled by that court in the recent case of Kansas *v.* Colorado (206 U. S., 46). In Sturr *v.* Beck it was, in effect, held that the plaintiff could make no appropriation as against Beck, who was a riparian proprietor and who was entitled to the undiminished flow of the stream. This claim as to the law was asserted and the same application thereof insisted upon in Kansas *v.* Colorado, in which the citizens of Kansas insisted that large quantities of water were being diverted from the Arkansas River by the inhabitants of Colorado, a large number of whom were claiming as prior appropriators and diverting the water to nonriparian lands, as against Kansas, a riparian proprietor. In Kansas the modified doctrine of riparian rights prevailed, while in Colorado prior appropriation was and is recognized as the governing doctrine. The court refused injunctive relief and dismissed the bill, stating in substance that if the riparian doctrine should prevail in Kansas as against Colorado and again nonriparian users whose rights were involved therein, Oklahoma and its citizens lower on the Arkansas River, might invoke the same rule in opposition to both the citizens of Kansas and Colorado, to their great injury, which doctrine it is observed, would be ruinous in its effect. The court, in dismissing the bill, indicated that no injunction would lie until a more substantial injury could be shown, and at the same time found that the interference by a large number of the appropriators above in the State of Colorado materially depleted the flow to the riparian lands of the plaintiff. This opinion was written by Mr. Justice Brewer, who was not a member of the court when the case of Sturr *v.* Beck was argued and submitted, for which reason, although a member of the court when the opinion in the latter case was filed, he took no part in the decision. The opinion in the Kansas-Colorado case not only brushes aside the rule claimed to have been announced in Sturr *v.* Beck, regarding riparian rights, but discloses what, in the opinion of the writer, is a strong and commendable tendency on the part of that great court to recognize that the rigid rules of common law, as interpreted and sought to be applied, by those insisting upon the "undiminished flow" theory, are inapplicable to the many new and intricate questions necessarily arising under our form of government and throughout the arid and semiarid sections. For a specific statement of the facts in this case, disclosing many of the defendants to have been using water on *nonriparian* lands, see the first opinion, which was on demurrer, *Kansas v. Colorado* (185 U. S., 125).

e come now to the adjudications in this State. While it is urged that
isions of this court have recognized a doctrine inconsistent with that
unciated, our attention is not directed to any where the question, as here
ted, has been before the court or in any manner urged or submitted.
ave we been able to find such a case. Numerous suits have arisen where
parian questions have been urged, considered, and discussed, and in some
cts determined, but in none does it appear that the lands were entered
the date of the act under consideration. If in fact the titles to lands
lved in some of the cases were obtained since the date of the act, the
rt's attention was not directed thereto, and it is well settled that no case can
deemed a precedent binding upon the court unless the point in question
s there presented or considered.

The first case in this State wherein the doctrine of riparian rights appears
have been considered is that of Taylor *v.* Welch (6 Oreg., 198), which, inter
lia, holds in effect that every proprietor of land through which a stream of
water may run is entitled to its undiminished flow without obstruction. This
opinion was filed in 1876, and no questions of irrigation were involved. The
rule there announced was not only unnecessary to a decision, but impliedly
modified in a subsequent opinion by Mr. Justice Boise in Coffman *v.* Robbins
(8 Oreg., 278), which holds that the flow may be diminished by the upper
riparian proprietor to the extent of the amount needed to supply his domestic
wants and a reasonable quantity for irrigation. Since that numerous other
opinions have been filed in this court, where directly and indirectly riparian
rights as affected by irrigation have been discussed, and points in reference
thereto determined, among which are Shively *v.* Hume, 10 Oreg., 76; Shaw *v.*
Oswego Iron Co., 10 Oreg., 371; Shook *v.* Colohan, 12 Oreg., 239 (6 Pac., 503);
Weiss *v.* Oregon Iron Co., 13 Oreg., 496 (11 Pac., 255); Kaler *v.* Campbell, 13
Oreg., 596 (11 Pac., 301); Faull *v.* Cooke, 19 Oreg., 455 (26 Pac., 662); Low *v.*
Schaffer, 24 Oreg., 239 (33 Pac., 678); North Powder Milling Co. *v.* Coughe-
nour, 34 Oreg., 9 (54 Pac., 223); Jones *v.* Conn, 39 Oreg., 30 (64 Pac., 193); Mace *v.*
Pac., 1068); Brown *v.* Baker, 39 Oreg., 66 (65 Pac., 799; 66 Pac., 193); Low *v.*
Mace, 40 Oreg., 586 (67 Pac., 660; 68 Pac., 737); Oregon Construction Co. *v.*
Allen Ditch Co., 41 Oreg., 209 (69 Pac., 455); Salem Mills *v.* Lord, 42 Oreg., 82
(69 Pac., 1033; 70 Pac., 832); Cottel *v.* Berry, 42 Oreg., 14); Morgan *v.* Shaw,
Harring *v.* Demaris, 46 Oreg., 111 (77 Pac., 603; 82 Pac., 593 (72 Pac., 584);
47 Oreg., 333 (83 Pac., 534); Seaward *v.* Duncan, 47 Oreg., 332 (84 Pac.,
1043); Parkersville Drainage District *v.* Wattier, 48 Oreg., 86 Pac., 640 (84 Pac.,
Williams *v.* Altnow, 51 Oreg., 275 (95 Pac., 200); Davis *v.* Chamberlain, 51
Oreg., 304 (98 Pac., 154).

In some of the foregoing cases it appears that the title passed before the
year 1877, while in all of the others the date of the initiation of the title t
the lands there alluded to as riparian is not disclosed, and no issue appear
to have been made upon that point. In Jones *v.* Conn the participants claim
as riparian owners only, and the cause was tried out on that issue, the da
of the inception of their rights presumably having no bearing thereon.
In Seaward *v.* Duncan the initiation of the contestants' rights to the
irrigated occurred after the year 1877; but the only issues presented were
the relative priorities of their appropriations of the water in dispute. Cre
Creek, there involved, flows through the lands of Seaward who used bu
inches of water for irrigation. Duncan was a nonriparian owner and in
upon having all the water in excess of that amount divided between h
and Seaward, although his ditch carried but 80 inches, being his full
priation and sufficient for the irrigation of his nonriparian tands. In
the court might have passed upon the question here considered had Se
relied upon his claim as riparian proprietor. Likewise in Seaward r
L. Co. (49 Oreg., 157; 88 Pac., 96) the same question might have be
mined had the company there relied upon that claim. But the issues t
those in the other case, being as to the relative priorities of their
and use of each, only these questions were adjudicated. It is mani
that these Seaward cases can not properly be cited in support of th
that the doctrine of riparian rights was not affected by the dese
the issues were not so framed nor proof offered thereon as t
considered, although it were possible to frame issues
ical to cite these cases as precedents on the
the other Oregon cases cited should
ht be given where the title
ual since 1877, and

ence was made thereto in any opinion filed thereon; but, like the above, and for the reasons given ,they are not in point.

33. Considering, then, the effect of the desert-land act upon the lands of the parties whose interests are here involved, the question arises as to what lands are riparian and what is the extent thereof. To determine what are riparian channels, a brief examination of the main stream, tributaries, and branches becomes necessary.

Silver Creek rises in township 31 south, range 14 east, on the slope immediately north of Sycan Marsh in Lake County, and flows northerly for a distance of about 25 miles into what was formerly Pauline Marsh, entering the marsh at a point near the center of section 2 in the township and range mentioned, where, until recent years, it spread and its current terminated. Until its bed was reclaimed the marsh covered about 10 square miles, through which Silver Creek emptied into Silver Lake, about 3 miles below. The stream is fed mainly by waters from the slopes south and southwest of Hager Mountain. During the early spring, beginning about March 1, it usually carries about 100 second-feet (sometimes reaching twice that quantity when at its highest stage), to from 40 to 50 second-feet during the first week in May, after which it rapidly recedes to about 11 or 12 second-feet, thus remaining during the rest of the year.

The west branch of Silver Creek rises in township 30 south, range 14 east, and flows into the main channel near the northwest corner of township 29 of the same range, and the two streams together furnish the supply of water mentioned.

Bridge Creek, a tributary of Silver Creek, rises in the Yamsey Mountains near the dividing line between Lake and Klamath Counties and runs northeasterly, emptying into Island Branch near the center of section 15, township 28 south, range 14 east, and thence into Silver Creek; and from February 1 until about June 15 furnishes an average flow of about 3 second-feet, after which it diminishes to 1 second-foot, and thus remains throughout the season. The quantity supplied by this stream is not included in the above estimate of the flow of silver Creek.

Beginning near the center of the south half of the northeast quarter of section 21, same township and range, a high-water channel, through which water seldom flows after the 1st of May of any year, leads from the east side of Silver Creek and returns to the stream about 1 mile below at a point near the southeast corner of the southwest quarter of section 15. At this point two channels diverge, one from each side of the creek, which, until artificially opened, were known as high-water channels, and through which no water ran at any time after the first week in May. The easterly divergence is known as Bunyard Branch, which, at a point near the center of the northwest quarter of the southwest quarter of section 14, again divides, from which point both branches continuing to a point near the center of the west half of section 13, township 28 south, range 14 east, practically disappear, emptying into what at the time the channel was opened was a marsh. The divergence from the west bank is known as Island Branch and flows northerly through section 15, returning to the main stream near the southwest corner of section 11. At a point near the southeast corner of the northwest quarter of the southwest quarter of section 11 there divaricates what is known as the Conley Branch, being a channel similar to the other branches named, which extends through the S. A. D. Porter onto the Conley lands and ends near the west line of the C. C. Jackson farm. In the southeast quarter of the northwest quarter of section 11 Silver Creek divides into two channels, each of which continues through the lands of Hough and the Occidental Land & Improvement Co. In section 2 into what was once Pauline Marsh. With the exception of the main channels of Silver Creek and its tributaries named, all were high-water channels merely, through which no water flowed after May 10 until improved or enlarged as indicated.

Between the years 1878 and 1882 the heads of Island, Bunyard, and Conley Branches were artificially opened, since which time, when the stream was not depleted by diversion for irrigation purposes, about one-fourth of the water has run through Bunyard Branch, one-half of that remaining through the main channel, and the remainder through Island Branch, all returning above the head of Conley Branch, through which latter channel, when not interfered with, about one-fourth flowed to Conley's premises, the rest continuing through the main channel. At this time the only residents on the streams were those occupying what are now the premises of Hough, Conley, S. A. D. Porter, J. C. Porter, and lands now claimed by George H. Small and E. D. Lutz, as well as

those of Lucindi Egli and George Durand, several miles above. The opening of these channels was acquiesced in by all on the stream, and since the year 1882 the water has naturally run through them in about the proportion indicated. Having flowed in this manner for more than the period prescribed by the statute of limitations, they have become fixed. (Cottel *v.* Berry, 42 Or., 593; 72 Pac., 584. Harrington *v.* Demaris, 46 Or., 111; 77 Pac., 603; 82 Pac., 14.)

Therefore, since about the year 1880 each of these branches have been well defined and recognized as a part of Silver Creek, and so far as riparian rights can be applied to the main channel, they attach with equal force to the branches named.

34. As nearly as can be determined from the evidence, and especially from the general maps and data to be gathered from the history and records of geological surveys of the country, commonly in use throughout the State at that time, and until reclaimed, all of section 2, except the south half thereof, and all of sections 1, 35, and 36, in township 28 south, range 14 east, and all of section 31, township 27 south, range 15 east, were swamp and overflowed lands constituting a part of Pauline Marsh, into which Silver Creek and its channels emptied. And while the water finally worked its way through the swamp and marsh into Silver Lake below, there was no practical channel over the lands constituting the swamp or marsh until after the settlement of the farms above on Silver Creek, its tributaries, and channels, after which the depletion of the flow caused by the use of the water above for irrigation, together with artificial channels constructed for drainage, reclaimed the land, since which it may be said channels have been formed; but when they were formed the record does not disclose.

When the water spreads with no well-defined current it can not be deemed a watercourse, such as will bring it within any rule permitting a claim thereto as riparian owner on the stream. It is not always necessary, however, that the stream flow through well-defined banks, but the current and course thereof must be clearly perceptible. On this point Mr. Farnham, in his work on Water, section 458, says:

"In order to constitute a watercourse the water must have a current. It can not be stagnant, nor spread out so as to destroy the current. If the water spreads out so that the current becomes imperceptible or is lost, the water becomes a lake or pond, and is no longer a watercourse." (See also Wiel, Water Rights (2 ed.), p. 161; West *v.* Taylor, 16 Oreg., 65 (13 Pac., 665).)

35. None of the lands claimed in section 2 by the Occidental Land & Improvement Co., or by Kittredge in section 36, or by defendants, McKune, Brown, Jones, Henderson, Jackson, J. M. Small, B. F. Lane, or those owned by J. C. Porter in sections 23 and 26, township 28 south, range 14 east, are riparian to any of the streams or channels mentioned. McCall's land was at one time riparian to one of the lower channels of Silver Creek, but for more than 10 years after his settlement thereon and prior to the commencement of the suit this channel has been closed, from which the water has been diverted into other watercourses during the dry season. He has, accordingly, lost such rights as he may have acquired, if any, as riparian owner. (Oregon Const. Co. *v.* Allen Ditch Co., 41 Oreg., 209 (69 Pac., 455); Harrington *v.* Demaris, 46 Oreg., 111 (77 Pac., 603).)

36. The respective owners of all lands situated on Silver Creek, its tributaries or branches, are entitled at all times to a sufficient flow of the waters of Silver Creek to supply their domestic needs, including a sufficient quantity for a reasonable number of stock. But no definite quantity for this purpose can, under the evidence before us, be fixed here, further than to hold that it must be such a reasonable quantity as to furnish an ample supply to all and in such a manner that the stream shall not become stagnant nor in any manner injurious to the health of the inhabitants or their stock depending on the supply.

37. The evidence before us being inadequate therefor, the flow necessary for this purpose in each of the channels must, therefore, be left for determination under this decreee to the court below in the event any question hereafter arises concerning such quantity, with permission to enter a supplemental decree in reference thereto, upon sufficient showing for that purpose by any of the affected parties. (See Morton *v.* O. S. L. Ry. Co., 48 Oreg., 444, 452 (87 Pac., 151, 1043).)

38. The surplus remaining after such wants and necessities are supplied during any season of the year are subject to appropriation, and rights thereto attached and became vested in the order of time in which the water has been diverted and appropriated.

39. Before considering in detail the rights of each we shall notice some of the facts and law of general application to respective rights involved. The quantity required for the proper irrigation of the lands varies from one-fourth of an inch to 1 inch per acre. The term "inch" wherever referred to is estimated on the basis of 40 inches to 1 "second-foot." (See Wiel, Water Rights (2 ed.), 278; Gardner *v.* Wright, 49 Oreg., 609, 636 (91 Pac., 286).)

40. In determining the "duty of water," or quantity essential to the irrigation of any given tract of land, we must take into consideration the character, the climatic conditions, the location and altitude of the lands to be irrigated, the kind of crops, period of time irrigated, and necessary manner of irrigation, as well as many other contingencies not arising here.

41. The "head" of water, or quantity entering the intake of any canal or ditch, must also be considered. A large body of water used at one time and upon the same tract will reclaim a larger quantity of land proportionately than will a small supply, for example: One miner's inch might prove inadequate in many instances for the proper irrigation of more than a small fraction of an acre, while 100 inches, or 2½ second-feet, if under the control of, and used by, one person at one time, might properly irrigate 300 acres of the same kind of land.

42. Applying these principles in the case at hand, where there are no small bodies or tracts involved, we think the water users, by the adoption and use of the more modern and economical methods now more generally applied and in use, will find that a constant flow of from one-third to two-thirds of an inch per acre will prove adequate for the proper irrigation of the lands. The allowance of from one-third to two-thirds of an inch per acre furnishes sufficient quantity, if permitted to flow continuously for 90 days, to cover the soil 1½ feet in depth (if the less amount), making 1½ "acre-feet"; or, approximately 3 feet in depth (if the larger amount), or 3 acre-feet, which is more than allowed by the Government Reclamation Service for the irrigation of lands in Klamath County where they have about the same altitude, climate, and soil, with similar crops and where the latest and improved methods of irrigation, as required by the Government, are in use. The "duty of water" there allowed by the Government under its irrigation project to each of the water users for the entire season is 1½ acre-feet, being the minimum here awarded. (6 Ann. Rept. of Reclamation Serv., p. 195.) In some instances a larger amount than the quantity here permitted was originally diverted; but merely because in the earlier history of the vicinity large quantities were diverted and applied, notwithstanding the ditches first constructed were of sufficient capacity to carry such supply, does not necessarily indicate that such was needed. Again, it has been so often demonstrated as to become a matter of common knowledge that lands after years of irrigation do not require the amount which when first applied was essential to the successful growth of crops thereon. This law of nature, added to the improved methods, greatly reduces the quantity now required. (See United States *v.* Conrad Invest. Co. (c. c.), 156 Fed., 123, 130.)

43. It is also argued that since under the old methods in use before the substantial depletion of the flow by subsequent appropriators, Hough and some others, by reason of the excessive water supply, with the aid of a few dams in the channels and sloughs, could irrigate with but little trouble or expense, the recognition by this court of the appropriations made by subsequent locators will thrust upon Hough and others, in order to avail themselves of the quantity awarded them, the necessity of changing their methods of application and use of the water, by the construction of ditches, etc., at great expense, all of which would be avoided were it not for the interference of such subsequent claimants. For this reason it is maintained that the rights of the later settlers and appropriators were acquired subject to the methods in use at the time of the inception of their interests. This feature, however, is similar in principle to that of the farmer who at first may have needed but 100 inches of water and yet constructed ditches carrying three times that quantity, using it in a wasteful manner, and which right he still insists upon by reason of the ditch when first constructed, being of sufficient capacity to carry the excessive supply. It is well settled that such a claim can not be successfully maintained. (Seward *v.* Pacific L. Co., Oreg., 157, 161, 88 Pac., 963.)

It is true, however, that no certain method is necessary to constitute a valid appropriation so long as the water has been applied to a beneficial use; and this may be done either by ditches or by other methods of diversion and application, such as the placing of dams in the streams and sloughs, and thereby

overflowing the land, or subirrigating it, as the case may be. (McCall *v.* Porter, 42 Oreg., 49; 70 Pac., 820; 71 Pac., 976.)

44. But will it do to say that in some cases irrigation was had by damming the sloughs with but little expense and work, causing the large excess of water supply to spread over the premises, and that the old methods which had their origin when there was but little demand for water and its supply correspondingly abundant, may be continued? In this arid country such manner of use must necessarily be adopted as will insure the greatest duty possible for the quantity available. (Van Camp *v.* Emery, 13 Idaho, 202 (89 Pac., 752); Anderson *v.* Bassman, 140 Fed., 14, 27.) The wasteful methods so common with early settlers can, under the light most favorable to their system of use, be deemed only a privilege permitted merely because it could be exercised without substantial injury to anyone; and no right to such methods of use was acquired thereby.

45. Owing to the little demand and large proportionate supply in use by those along Silver Creek and its branches in the early eighties together with the lack of general knowledge and experience on the subject throughout the State, wasteful methods at that time were, no doubt, common; but of recent years improved means throughout the West have come into use, and a scarcity of the supply has made a more economic use necessary. The result is that the law has become well settled that beneficial use and needs of the appropriator, and not the capacity of the ditches or quantity first applied, is the measure and limit of the right of such appropriators. (Kinney, Irr., 30; Long, Irr., secs. 54, 55; Wiel, Water Rights, p. 263; Seaweard *v.* Pacific L. Co., 49 Oreg. 157, 88 Pac., 963; Gardner *v.* Wright, 49 Oreg. 609, 91 Pac., 286; Union Mill M. Co. *v.* Dangborg, C. C. 81 Fed., 73, 119; Anderson *v.* Bassman, C. C. 140 Fed., 26.)

During the spring freshets and prior to May 10 of each year the quantity flowing in the channels of the stream below the junction of the main and west fork of Silver Creek is sufficient when properly distributed and economically used to irrigate all the lands heretofore framed in the vicinity. And there appears to be no controversy respecting the use of water earlier than about that date. The irrigation season in the vicinity of Silver Creek, as a rule, begins April 1 and usually ends in July. The crops produced consist largely of natural hay, such as blue joint, red top, and other native grasses.

46. A number of the appropriations were made by the parties hereto, or by their predecessors, long before the lands were filed upon or title thereto acquired. In this connection it is argued that a right to the use of water necessarily has its inception only from the date the filing is placed upon the land. The right of a person claiming an appropriation of water can not be tacked to that of a mere squatter who, while he may have irrigated the land, has abandoned it (Low *v.* Shaffer, 24 Oreg., 239, 33 Pac., 678.)

47. But a squatter upon public lands may even by parol transfer his claim and interest, whatever it may be in this respect, to another, and the rights of the subsequent purchaser and of his successors in interest, if asserted under the doctrine of prior appropriation, relate back to the date of the first appropriation by the person with whom there may be a privity of estate. It is well settled that the entryman need not necessarily have a complete title to the land in order to acquire a water right therefor.

48. A mere claim of right to the land, supplemented by a diversion and appropriation of the water, is sufficient to entitle him to convey to another such interests as he may have, whether such appropriator be a mere squatter or lessee, or other person in possession. (Rowland *v.* Williams, 23 Oreg., 515, 32 Pac., 402; Seaweard *v.* Pacific L. C., 49 Oreg., 157, 88 Pac., 963.)

49. Another question developed by the facts to follow, is that some of the rights acquired were in the irrigation of lands reclaimed as swamp lands, in respect to which it is maintained that the use of the water thereon was not essential to their reclamation or irrigation. The legal effect of such use depends upon the facts of each particular case. Merely because the land may have been reclaimed as swamp land does not necessarily deprive it of the need of irrigation.

50. The circumstance that it has been reclaimed may raise a presumption that at a particular time it required no water for irrigation; and testimony to that effect may be admitted in evidence for the purpose of ascertaining the quantity of water essential to its productiveness. But when it appears that the land has in fact been reclaimed sufficiently to entitle its possessor to a deed *from* the State, if in an arid section, it implies that the land has been deprived *of its excessive moisture* and thereby restored to the same condition as other

agricultural lands in the vicinity and subject to the same rights in respect to the stream flowing through it, or in an appropriation from any source of water supply for its irrigation.

51. This brings us to a consideration of the relative priorities of the parties. By stipulation each of the parties are deemed to be the owner of the respective tracts of land alleged to belong to them, but the dates as to when and how the titles were acquired, with the exception of that of the property of the Porters and one or two others, are not disclosed, the testimony being directed only to the dates of the first settlement and to when the water was first diverted.

The appropriations, considered in the order of the dates made (the numbers indicating their relative priorities), together with the acreage upon which they applied and number of inches to which each is entitled, are as follows:

(1) Anna C. Hough's title to the lands described as belonging to her had its inception in May, 1878, and the appropriation for irrigation thereof had its inception June 1, 1878, by means of dams placed in the various channels flowing over the premises, diverting water therefrom for irrigation of the land, since which date its use has been continuous, except when interrupted by adverse claimants. Settlement on the lands and use by this method of the water for irrigation date from 1873, but the privity of estate between the various occupants is not established as to any settlement antedating May, 1878. There were irrigated on the Hough farm not more than 200 acres of land, which were brought under irrigation within a reasonable time after the first use of water thereon, as indicated. The lands require not to exceed 100 inches of water, or 2½ second-feet, for the proper irrigation thereof, as a first right as against all on the stream, except that of John C. Porter, with whom such right is coincident in time.

(1*a*) John C. Porter's title to the north half of section 14, township 28 south, range 14 east, relates back to June, 1877, and the first appropriation of water thereon to about June 1, 1878. There was applied to a beneficial use within a reasonable time in the irrigation of 240 acres 100 inches of water, the right to which dates from June 1, 1878, and is coincident with that of Anna C. Hough. It may be diverted to his premises by either Bunyard Branch or Silver Creek, or by ditches therefrom.

(2) Lucindi Egli's lands are situated above all of those of the other parties named, except George Durand, and consists of about 400 acres, the title to which relates back to 1879, and the water right for which was located in April, 1882, her rights attaching as of that date, and used in the irrigation of 240 acres, requiring 120 inches.

(3) Marion Conley's title to his land relates back to the year 1880, of which he irrigates 240 acres. It develops that he made a cut from the main channel of Silver Creek into what has since been known as Conley Branch, to drain some swamp land in the year 1877, and some effort was made at the trial to establish his appropriation of the water as of that date. It is not clear, however, as to where this swamp land is situated. The evidence strongly tends to show that it was on the opposite side of Silver Creek and that by turning the water from above the lands in another direction he was able to reduce its swampy character and thereby to cut some hay crops thereon. It is not shown that this constituted any part of his present 320-acre tract. But it is clearly and satisfactorily established that about May 1, 1880, he made a cut, opening up the Conley branch of Silver Creek, thereby connecting it with the main channel and diverted the water through it to his premises for irrigation purposes, since which time he has constantly used water through this channel in the irrigation of his lands to the extent mentioned, for which purpose an aggregate of 100 inches of water at the points of diversion from the Conley branches near his premises is sufficient. To this quantity he is entitled as of the date last named.

(4 and 6.) George H. Small's testimony is to the effect that the title to most of his lands relates back to the year 1878, by reason of having settled there at that time, and on account of which he claims a water right from that date. The ownership, however, is averred to have its inception only 10 years prior to the commencement of this suit. He claims to have constructed the first ditch in 1881, which was taken from the stream at a point known as the junction with Silver Creek of Island Branch and Bunyard Branch, and that he constructed the other two ditches in the year 1882. Fifty inches of the water claimed is taken from Bridge Creek. But after a careful examination of the testimony, we conclude that all except the first division was made in the spring of 1884 and made for the purpose of procuring title to about 600 acres under

the desert-land act. He has 1,800 acres of land, of which we find 600 consist of what was once his desert claim, filed on in 1884. It does not appear from the record where he finally procured his title to his lands, but one of the exhibits in evidence discloses that all his land in section 15—600 acres of which he claimed for a long time to be the owner, but the title to 240 acres of which was finally acquired by Lutz (Small *v.* Lutz, 41 Oreg., 570)—was sold by the State in 1885 to different parties as swamp land, one part of which, the northwest quarter of the northwest quarter and the southeast quarter of the southeast quarter, was deeded by the State to Small under the swamp-land act. It is strongly disputed that Small irrigated any lands or made any attempt to do so prior to 1884. The fact that 600 acres thereof were claimed and attempted to be procured under the swamp-land act affords strong evidence that no irrigation thereof was made prior to that date. Moreover, it appears that 240 acres of the land which he claims to have irrigated at that time did not belong to him; that he was a trespasser thereon, this land being subsequently procured by the defendant Lutz from the Government; and that the irrigation and claim therefor by Small was finally abandoned. The attempt to procure title to the desert-land tract, as admitted by Small, discloses that no claim to water could well have been made for the irrigation of that tract prior to 1884, as it was necessary in filing thereon, which is conceded, to make affidavit to the effect that the land had not in any manner been reclaimed prior to that date. (Houck *v.* Bettelyoun, 7 L. D., 425.)

53. Coupled with this circumstance is the testimony of S. A. D. Porter, with other evidence, to the effect that no appropriation was made by Small prior to 1884. However, there is some strong evidence tending to show a diversion and use by him of the water in 1881 or 1882. But we think a clear preponderance of the testimony establishes that, outside of the lands then deemed too swampy for use and after deducting the 240 acres of Lutz's land, not more than 300 acres were intended to be irrigated by Small, not including the island property, at the time of completion of his ditch in 1884; nor did he intend to increase his irrigation at any time prior to the year 1895. For this delay no cause is assigned, and the delay in increasing his appropriation being unreasonable, his use is limited to 120 inches as a total allowance for 360 acres, being the water diverted in and prior to the year 1884, which renders subsequent appropriations and applications of the excess of waters by others valid. (Seward *v.* Pacific L. Co., 49 Oreg., 157, 161.) At that time 200 or 250 inches of water may have been deemed necessary, and possibly more than that quantity was diverted through the ditches at that time, when claimants were few and water in abundance; but, as before stated, the right to the use of water must be limited to the quantity necessary for the proper care of the land, for the reclamation of which the right was acquired. It appears that no more than one-half inch per acre is actually needed for this purpose, and even less may suffice where the water is used in large quantities. We, therefore, think that 150 inches, limited in its use to 300 acres, is about the quantity actually intended in 1884 to be diverted, and is all that is required for the lands then claimed and, prior to 1895, farmed by Small, and for which no intended or attempted diversion was made prior to 1884.

54. In addition to the above amount 100 inches were diverted by Small in June, 1882, and used for irrigation of the island between Island Branch and the main channel, about half of which was used upon the Lutz tract. And since he lost the Lutz tract 40 inches of this appropriation are ample for the remaining lands, not exceeding 60 acres, belonging to him on the island, to which quantity he is entitled for the irrigation thereof, dating from June 1, 1882. None of the quantity acquired under this (1882) appropriation can be used elsewhere without prejudicing others' rights, for which reason he is limited to its use when needed, to the lands mentioned. There is no satisfactory evidence of any intended use of more than sufficient to irrigate the lands covered by this diversion prior to 1884, when his second ditch was commenced, which, for the reasons given, we are satisfied was begun on the latter date.

The second appropriation (1884) consisting of 150 inches, 50 of which were from Bridge Creek, dates from June 1, 1884; and he is entitled as of this date to 50 inches from Bridge Creek and to 100 inches from Silver Creek or its branches, measured at the point of diversion therefrom, and is limited in its use to the irrigation of 300 acres.

(5) S. A. D. Porter's title to his lands, consisting of 320 acres, described in *the former opinion*, relates back to the year 1880. The first diversion for irri-

gation purposes for which use thereafter was continuous was made in May, 1883, and prosecuted to completion until 240 acres were irrigated, for which he requires not to exceed 100 inches for the proper irrigation thereof, the right to which had its inception May 1, 1883. To this quantity he is entitled as of that date.

55. (7) Walter C. Buick, Corinna Buick, Lulu Corum Labrie, Isa Corum (a minor), Jewell D. Corum, and J. M. Small, through their predecessors in interest are the owners of the lands described as belonging to them, for which they originally acquired a water right through what is known as the Buick-Corum-Small ditch, tapping a channel of Silver Creek in the southeast quarter of the northeast quarter of section 21, township 28 south, range 14 east. This channel diverges from Silver Creek near the center of the south half of the northeast quarter of the section named, and returns to the main stream near the northeast corner of the northwest quarter of section 22, from which point it again diverges, and below which it is known as the Bunyard Branch. The construction of this ditch was begun in March, 1885, and completed in the following year within a reasonable time from the commencement thereof. Their rights to the water thus acquired relate back to March, 1885, the date of the commencement of its construction. (Nevada Ditch Co. *v.* Bennett, 30 Oreg., 59, 86.) The testimony respecting the carrying capacity of this ditch varies from an estimate of 229 to 600 inches. Mr. Moore, an engineer, testifying in the case, states that he surveyed it at a point where he thought was its smallest carrying capacity, which he estimated at 229 inches, the survey being made by him a short time before taking the testimony. The testimony discloses, however, that the ditch has been neglected for the past five or six years and the capacity thereby reduced about one-third. This is probably due to the fact, as disclosed by some of the testimony, that the owners of the ditch during recent years have been receiving a large part of their supply through the Bunyard branches. We feel justified, under the evidence, in fixing the capacity of this ditch and right of the appropriation acquired through it at 300 inches at the intake thereof, which, allowing for evaporation and loss by seepage for a distance of 3 or 4 miles before it reaches the Small farm, the last on the ditch, should deliver at the points of use somewhere from 270 to 280 inches,, which, if properly distributed and economically used, is ample for the irrigation of all the lands under it.

56. There is irrigated by Walter C. Buick and Corinna Buick, his wife, 120 acres from this canal and 20 acres from Bunyard Creek. Isa M. Corum, a minor, Lulu Corum Labrie, and Jewell Corum, together irrigate 40 acres; and a like acreage has been irrigated for a number of years by J. M. Small. A part of the lands of each of these parties appear to be supplied with water from the different branches of Bunyard Creek, including a new ditch taken out of this branch, the quantity used in this manner and acreage on which it is applied not being clear. J. M. Small states that he uses in irrigation about 60 inches from the ditch and 100 inches in all. It is clear, however, that their right has been acquired through this source, and upon it they must rely to determine the quantity to which each of them may be entitled, as well as to fix the date of the inception of their rights, which, as stated, began March 1, 1885. They are tenants in common, both as to the ditch and water right. (Moss *v.* Rose, 27 Oreg., 595.) There is no controversy or issues between them in this suit, and as all claim through the same ditch and from the same original appropriation, no decree should be entered as to their relative rights.

57. As against the other parties to the suit. Corum and wife are limited in their use to the quantity required to irrigate 140 acres, not to exceed the use of 90 inches of water, as measured from the point of diversion from the ditch or channel of Bunyard Creek, as the case may be. Jewell D. Corum, Lulu Corum Labrie, and Isa Corum are jointly limited to a like amount and quantity under similar measurement, as is also J. M. Small.

58. It is suggested that the defendants can not change their use or any part of it from the ditch to the channel of the creek and thereby make use of Silver Creek and Bunyard Creek and mingle the waters with those of other users on Bunyard Creek, and take water out at some other point; that by so doing they lose their rights to the extent thus attempted to be used and applied. It is settled, however, that any ravine, gulch, or hollow, as well as the natural channel, may be used in transmission of the waters to his premises by the appropriator. (Simmons *v.* Winters, 21 Oreg., 35, 44.)

59. The appropriator can use either the original canal or ditch as constructed, or any other channel for the purpose of conveying the water to any point of use.

60. If they or either of them elect to use from Bunyard Branch in lieu of from the ditch the difficulty of measuring it arises, to obviate which allowance must be made for evaporation and loss by the different methods of diversion and distribution, together with the added distance which the water may have to flow in order to reach their premises through these channels. In order to meet these contingencies we think it proper to estimate the difference in the quantity thus used by the acreage upon which it is applied, and if used through any other source than that of their original canal, alluded to, that 1 inch should be deducted for each acre of land irrigated from the Bunyard or other branches, or ditches leading therefrom, so that in the aggregate the water passing the intake of the channel from which the original ditch was taken and into the head of the Bunyard channel as used by them shall not at any time exceed in the aggregate, so far as their use and appropriation is concerned, 300 inches, when needed by others using the water along the creek from any of its tributaries or channels.

61. It is urged in respect to their rights that only a part of the lands were entered or in cultivation when the ditch was first dug, and that the rights of each of the parties interested in this ditch are limited to the time when the lands of each were acquired and the irrigation thereof commenced. Whatever may be the rule elsewhere, this question is set at rest in the very clear and able opinion by Mr. Justice Wolverton, in Nevada Ditch Co. *v.* Bennett (30 Oreg., 59), where this feature was prominent among the many points relied upon. It was there held that a bona fide intention to devote the water to a useful purpose, which is required of an appropriator, may comprehend the use to be made by or through other persons and upon lands and possessions other than those of the appropriator.

62. It is also maintained by counsel for appellants that since the Buick ditch for some distance runs through the property of the Occidental Land & Improvement Co. and was constructed under a written agreement to the effect that the construction of this canal and continuance thereof on these premises is permissive only, that therefore no substantial right was acquired by the appropriation and diversion through this source. This is a question, however, with regard to which none but the Occidental Land & Improvement Co. are in a position to complain, and no issue is made by the pleadings nor is any proof offered thereon between this company and the users and claimants of water through this ditch, for which reason these circumstances can have no bearing on the rights of the parties herein.

(8) P. G. Chrisman and J. C. Porter's rights to the lands described in the former opinion as belonging to them (not including any owned by Porter in section 14) were acquired, and title to their respective titles are as follows: The south half of the northwest quarter of section 24 and the northeast quarter of section 23, township 28 south, range 14 east Willamette meridian, entered by Porter under the desert-land act of 1884. The west half of the southeast quarter and the southeast quarter of the southwest quarter and all of the northeast quarter of the southwest quarter, except the part thereof on which the town of Silver Lake is situated, of section 22, township 28 south, range 14 east, was entered by Chrisman in 1884. The water used in the irrigation of these lands was obtained through what is known as the West-Porter-Martin ditch, tapping Silver Creek at a point near the center of section 21, township 28 south, range 14 east, which ditch was first begun September 1, 1885, and completed the following year, during and since which time it has been used in the irrigation of the above lands. The quantity of water used upon these lands and to which a right was acquired sufficiently appears from the capacity of the ditch, as it is evident that the ditch was used to its full capacity, all of which was needed and applied in the irrigation of the farms mentioned. The ditch has a carrying capacity at the intake of 200 inches, which should be the limit of the quantity allowed under their appropriation for irrigation of the lands described to the extent of 300 acres, not to exceed, in the aggregate, 200 inches, when needed, the right to which dates from the time of the commencement of the ditch in September, 1885.

It is insisted that this ditch and appropriation therein by Porter and Chrisman was made by what is known as the Silevr Creek Irrigation Co., an alleged corporation which is not a party to the suit; and it is so found by the court below. The evidence, however, fails to disclose the perfection of the corporation under the laws of the States, nor does it clearly identify this appropriation as the one intended to be owned by the contemplated corporation. But it is *sufficiently established* that the ditch was begun in the year 1885 by Chrisman,

Porter, and others, its completion and use the following year, and the subsequent acquirement of the rights of all the parties therein by Chrisman and Porter, in respect to which, including the water rights therein, they are tenants in common.

(9) C. C. Jackson is the owner of 160 acres of land, which he has irrigated since June, 1886, by means of what is termed "waste and seepage water" from the farms adjoining his premises. While there might be some seepage water flowing to his premises from lands above, there would be no waste water if those above follow the economical methods required by law. The so-called waste water has evidently been the water diverted by the parties above him, in excess of the quantity needed. By the use of this surplus through the Conley branch and branches over the lands above him, Jackson has, without objection, secured a right to such an amount thereof as taken together with the seepage mentioned will properly irrigate the 160 acres named, not to exceed 80 inches, the right to which dates from June 1, 1886.

(10) W. H. McCall's title to the 160 acres described as belonging to him took effect in the year 1887, of which 120 acres have been irrigated by taking water from the high-water channel flowing through his premises, which water naturally flows through there until May 10 of each year. To the use of this water he is, in common with all others on the stream, entitled until that date, and not to exceed 80 inches afer May 10 of each year, the right to which dates from April 1, 1887.

(11) B. F. Lane and Jennie Lane's rights attached to the land described as belonging to them May 1, 1888, and their rights to the water necessary for the proper irrigation of 160 acres thereof in May of the same year. The lands require 90 inches of water for their proper irrigation, which is taken through Bunyard Branch and to which they are entitled as of the date named at the point diverted from that branch.

64. (12) George Durand's land is situated on Silver Creek and above all of the other parties. He seems to have initiated a title thereto in 1878, but claims a diversion of the water only for more than 10 years prior to the institution of this suit. A diversion more than 10 years prior thereto (Apr. 1, 1890) and subsequent use is established; but no evidence was offered showing an earlier use. Having established these facts, he made a prima facie showing of adverse user.

65. This having been established, the burden of showing that such user was not a substantial interference with the rights of others was thereby shifted to the parties questioning such claim. (Gardner *v.* Wright, 49 Oreg., 609, 628.) This want of substantial interference, however, was clearly established by proof to the effect that there was no material shortage of water among those below prior to 1895. For this reason neither he nor any of the parties relying on 10 years' adverse user are in a position to maintain this defense. (Bowman *v.* Bowman, 35 Oreg., 279.)

66. Rights to the use of water acquired by prior appropriation and adverse possession are not inconsistent. (Gardner *v.* Wright, 49 Oreg., 609, 632; Davis *v.* Chamberlain, 51 Oreg., 304; 98 Pac., 154.)

67. Since, therefore, Durand has pleaded an appropriation and use thereof adversely for more than 10 years prior to the institution of this suit, he has alleged the date of his first diversion and continuous use thereafter since April 1, 1890, the proof of which, although not sufficient to establish his title thereto by adverse possession and use, is ample to fix the date of his appropriation; and such rights as he may have he takes in the order of his priority. As an appropriator his rights are established to the extent of 160 inches, limited to the irrigation of 480 acres, and date from April 1, 1890.

68. (13) The Occidental Land & Improvement Co. is the owner of 2,200 acres of land. Of this amount 880 acres are in the north half of section 2, township 28 south, range 14, and have never been irrigated from Silver Creek. Other lands belonging to this company were irrigated from Silver Creek and are situated upon Bridge Creek in section 16, township 28 south, range 14 east, not exceeding 120 acres, and require 80 inches of water for the proper irrigation thereof. Two hundred and forty acres can be irrigated from Silver Creek, of which 120 acres were irrigated, as stated, fom Silver and Bidge Creeks, from May, 1889, to the year 1893.

The right to the use of water by nonuser alone can not be deemed forfeited short of the period prescribed by the statute of limitations for real actions. (Dodge *v.* Marden, 7 Oreg., 456.)

69. *But such right may* become extinguished by any act showing an intent to *surrender or abandon* the right after which, if the person having the right ceases

its use for one year, his interest is lost; but the facts essential to a forfeiture by this company is not established by the proof. The nonuse from 1893 to 1900 is shown, but this alone is insufficient. To constitute an abandonment of a water right there must be a concurrence of the intention to abandon it and an actual failure in its use. (1 Cyc., 4.) This company should be awarded 80 inches, to be taken from either Bridge Creek or Silver Creek, the right to which dates from May 1, 1889.

70. (14) E. D. Lutz appears to be the owner and in possession of the east half of the northwest quarter and the northeast quarter of section 15, and the northeast quarter of section 10, all in township 28 south, range 14 east, the title to which relates back to 1890. During the summer of that year some of the water was applied by him in the irrigation of the lands in section 15, but three years later he was ousted by George H. Small, who took charge of the irrigation of all these lands, claiming ownership thereof as to all except the east 80 acres then held by J. C. Harrow as a timber-culture claim. Lutz remained out of possession until about the time of the hearing herein, when it seems he prevailed in court, again resuming possession. (See Small *v.* Lutz, 41 Oreg., 570.)

Lutz for a short time irrigated these lands but was interrupted and prevented from continuing by Small, who, while wrongfully in possession, irrigated the premises and raised crops thereon. The absence of Lutz not having been voluntary, but having been an enforced removal therefrom, he can not be deemed to have abandoned his rights to the use of the water. An absence from land wrongfully forced does not work a forfeiture of any interest the owner may have therein. (Huffman *v.* Smyth, 47 Oreg., 573.)

71. To permit Small to change the use of this quantity to other lands would work an injury to Lutz as well as to others below on the stream, which should not be permitted. While well settled that a change of use and place of the use of water by an appropriator may in some instances be permitted, such right is always limited to changes that do not impair the rights of others interested in the water of the stream. It appears that 100 inches of water is sufficinet for the proper irrigation of this land, the right to which quantity attached in May 1890, when first irrigated by Lutz, and is limited in its use to 200 acres.

(15) F. M. Chrisman's right to the southeast quarter of section 12, township 28 south, range 14 east, and water for its irrigation relates back to May 1, 1891, to which he is entitled to 60 inches for the irrigation of 100 acres. The water for this purpose may be received through either Bunyard or the Conley Branches, or through both if necessary.

(16) Mary C. Brown's land, consisting of 100 acres, was settled on in November, 1892, and water appropriated for the irrigation thereof to the extent of 50 inches May 1, 1893, to which quantity she is entitled; and her right attaches as of that date.

(17) Mary J. Kittredge's title to her tract of 640 acres is alleged to have been procured from the State, but her interests are not shown to be connected with the State's title. The testimony discloses it first to have been settled upon in 1885, but the proof does not definitely fix the date when the first use of water was made for irrigation purposes, evidently relying upon her claim as a riparian owner, which, owing to the fact that until recent years the land was a part of Pauline Marsh, was not clerly established. It appears, however, that it has been irrigated since 1894 by means of dams placed in the channels of the stream, spreading the water over the premises to the extent of 480 acres, which by the means of dams and ditches could be properly irrigated with 160 inches of water, which quantity will be allowed her, dating from May 1, 1894. Since the land is low and of a swampy nature, we believe the quantity indicated is ample for its irrigation.

(18) P. W. Jones's right to the land owned by him began in June, 1893, and appropriation of water for the irrigation thereof in June, 1894, the water right therefor dating from that time. Fifty acres of his lands are irrigated from the waters of Buck Creek, not involved here, and 160 acres from Silver Creek, for the irrigation of which he is entitled to 80 inches of the waters of Silver Creek.

(19) C. E. McKune's lands were first acquired in the year 1890, and his right to the use of water for the irrigation of 100 acres thereof, to the extent of 50 inches, began in May of that year. His rights therefor attach as of that date.

72. (20) E. K. Henderson's rights to his lands were acquired through the State of Oregon as swamp land in section 1, township 28 south, range 15 east. We are riparian to Silver Creek or to any of its branches. No proof is offered

respecting the character of his land, as to whether it is susceptible of or needs irrigation, sufficient on which to base any decree. Nor does it appear that he claims any rights in any of the controverted waters or that he was a proper party to this proceeding, for which reason the suit should be dismissed, as to him, without prejudice.

73. Plaintiffs W. H. Hays, J. M. Hays, John Hays, and A. C. Geyer at the trial took a voluntary nonsuit. Since the court ordered these parties brought in, it had a right to refuse to dismiss, as to them, and, in the event they further declined to appear, to enter such decree against them as would have determined their relative rights with those of the other parties. Being dismissed, however, and the proof not disclosing that they are proper parties hereto, the court acted within its discretion in granting the nonsuit. Their rights will accordingly remain undetermined.

74. As to the defaulting defendants, a decree should accordingly be entered in favor of all other parties herein. It is maintained that, as to the parties named who have not appealed, no decree can be entered here respecting their rights more favorable to them than as entered by the trial court. It is the general rule that on appeal it will be presumed that, as to those not appealing, the decree is satisfactory and will not be disturbed. (Seaweard *v.* Duncan, 47 Oreg., 640.) But for the reasons given for the inapplicability of the general rule respecting pleadings, in re plaintiffs' and George H. Small's interests, the rule suggested by counsel respecting the rights of parties not appealing is not adapted to suits of this kind, and will accordingly not be invoked.

75. The parties hereto are each limited in the application of the water adjudged to them, to the specific tracts upon which it has heretofore been applied, except in such instances as where it may be practicable to change the place of use without substantial injury to others whose rights are here determined; that is to say, if by changing the place of use when the water is needed by others, the quantity returning to the stream after changing the place of use as compared to its previous application is substantially diminished, or if by reason of such change the "run off" reverts to the stream or channel below the point diverted by another, thereby reducing the supply at such point, it must necessarily operate to the injury of the rights of such other party, and the change must not be permitted. (Wiel, Water Rights (2 ed.), sec. 47; Williams *v.* Altnow, 51 Oreg., 275; 97 Pac. 539.)

76. Again, the use of the water by each, for reasons given in the case last cited, must also be limited in its application to the acreage of land, upon which previously applied, except at such times as the water or some part thereof may not be needed by others; and the owner not requiring its use should not be permitted to complain of its application to a beneficial use by others interested. In other words, at all times that the water is not required by one or more it must be at the disposal of others in the order of their relative rights thereto. (Mann *v.* Parker, 48 Oreg., 321; 86 Pac., 598. Gardner *v.* Wright, 49 Oreg., 609, 637. Williams *v.* Altnow, 51 Oreg., 275; 97 Pac., 539.)

It is maintained by counsel for George H. Small that since plaintiffs, in their reply as well as at the trial, admitted that Small is prior in time and superior in right to them, to the extent of a constant flow of 500 inches of the water, the decree must recognize his rights accordingly. If this were a contest between the plaintiffs and Small only, and a decree could be entered in that manner without prejudicing the rights of others whose interests are involved, this position might be tenable; but Small came into this suit under the order of the court issued for the purpose of enabling it to adjust the rights of all, with a view not only to the entry of a decree that will be effective but that a multiplicity of suits might be obviated. The trial court having this authority (B. and C. Comp., sec. 41), it follows that this jurisdiction carries with it all the power essential to the making of such order effective.

77. If then some of the parties neglect or refuse to file pleadings asserting their rights, or, having done so, have presented them in such manner that an enforcible decree, or one in harmony with the spirit of the order, can not be entered, and it appears that the cause has been tried and evidence taken and submitted, the court may, in the exercise of its sound discretion, either direct the pleadings to be amended to conform to the proof or treat them as amended and enter a decree accordingly.

Such discretion is essential to the effective exercise of the equity jurisdiction in this class of cases. Water suits are, in a sense, sui generis, for the complications and many intricacies developed by litigation of this character *of late years, when all* available lands are rapidly becoming settled, resulting

in most instances in the demand for water exceeding the supply, necessarily give rise to new questions of practice not covered by the statute nor aided by precedent. The courts then are confronted with the dilemma either of exercising their discretion in such matters or of making an exception to that well-known maxim, which is the foundation of all equitable jurisdiction, that "equity will not suffer a right to be without a remedy."

A good illustration of the necessity at times of deviating from the usual course in matters of practice involving controversies of this kind may be found in Kansas *v.* Colorado (185 U. S., 125). In that case an attempt was made to state all the facts in the complaint and thereby to secure a determination of all legal points involved upon demurrer. The defendants, by demurrer, having admitted the facts pleaded, it would seem that the court, if it had followed the usual practice in such cases, would have determined the legal status of the parties without the necessity of taking the testimony. But in considering this phase Mr. Chief Justice Fuller, at page 145 of 185 United States (p. 559 of 22 Sup. Ct.) of the opinion, says:

"The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem to us wise to apply that rule; and we must decline to do so."

It thus appears that courts of equity are not necessarily bound in all cases by the rules of practice usually invoked.

Now, as heretofore held, the court may direct all parties interested, or claiming any interest in, the subject-matter of litigation to be brought in and require them to interplead with reference to each other (51 Oreg., 367; 95 Pac., 732–749); but it can not make them plead any certain facts; it must leave it to them to determine the course to be pursued in that respect. But, if in the exercise of such rights under the order, such parties default or fail properly to plead or to offer proof, they assume the risk thus incurred and are necessarily impelled to abide the result to follow; and the court, in the exercise of its discretion, may either enter a decree affecting their interests or not, as it may deem just and equitable.

78. We can conceive of no case calling for the exercise of the discretion of this character stronger than the one under consideration. It was begun in February, 1900, nearly nine years ago. It was first instituted by Hough against S. A. D. Porter, and the testimony taken disclosed that owing to the interference in the use of the water by Small and others not parties to the suit, a decree between the contestants there would be futile. For this reason the court below, in the exercise of its sound discretion, directed all persons interested in Silver Creek, its tributaries and branches, to be made parties, with a view to determine their respective rights as speedily as practicable. The complaint was amended accordingly and all made parties and served with summons, together with a copy of the order of the court. Of those thus served, some defaulted, others neglected to offer any proof respecting their rights, while the pleadings of some are imperfect, and the plaintiffs as well as some of the defendants have neglected properly to frame issues between themselves. And, added to this, is the greater and more difficult problem developed by the plaintiffs, making the admission alluded to respecting Small's rights, which admission is not only unsupported by the evidence, but it is disclosed that Small is subsequent in time and inferior in right to the plaintiffs Hough and Conley, as well as subordinate to the right of J. C. Porter, and subsequent in right to 150 inches of water to that of S. A. D. Porter. Now, if because no issues are framed between the plaintiffs, the court must necessarily refuse to enter a decree determining their relative rights, it would have been within the power of the litigants, after the entry of the order of the court requiring them to be brought into the suit, to have completely defeated its purpose by all joining as plaintiffs and making S. A. D. Porter the sole defendant, the absurdity of which is obvious. Concerning the second point: If on account of plaintiff's admissions in aid of Small, a decree must be entered in his favor for 500 inches as a first right against them, and at the same time Hough and Conley must be awarded a prior right as to S. A. D. Porter, and decree that Hough's rights are coincident in time and equal in equity with those of John C. Porter, as must be done under the evidence, then what follows? John C. Porter must be decreed a first right as against George H. Small to 100 inches and (after Small's first 40 inches are *supplied)* S. A. D. Porter must be awarded a superior right as against Small to *another 100 inches* of the water. Then, pursuing the course urged by Small, *account of plaintiffs'* admissions, it would be decreed that after he received

his first 40 inches he must let 200 inches flow down to the Porters, but that as against Hough and Conley he may use 500 inches of what is left; but during the low-water season when there are not more than 500 inches in the stream Small would be entitled to 300 inches of this quantity; then on turning the remaining 200 inches down to the Porters, as soon as they would begin using it, Hough and Conley, under the decree, would demand, and have a right, to exact that the Porters let it flow down to them, and as soon as the water would strike the Hough and Conley farms it would again be rightfully claimed by Small to make his full quota of 500 inches of water allowed. Then as soon as this request were granted the Porters would require Small to turn 200 inches loose for them, and so on ad infinitum. Such an anomalous condition might have arisen if all the rights had been determined in separate suits, but it would be ludicrous to accede to such demands under the facts disclosed in a case like this, where all the parties are before the court. No admission by plaintiffs in favor of Small can be recognized when such concession would necessarily work to the material injury of others whose interests are involved. Small can insist upon no greater privilege in this respect than if he were a coplaintiff; and whether he be treated as a plaintiff or defendant, to recognize the admission in his favor, even if only to the extent of awarding a right prior to Hough and Conley, would, as shown, be inimical to Porters' interests, who are not parties to plaintiffs' concessions.

79. Again, it is pleaded by the Porters, as a defense against plaintiffs and Small, that they are in collusion, in respect to which it is averred that they have entered into a conspiracy to enable Small to obtain a decree for 500 inches of water as a first right against all on the stream, in such a manner as to permit the water to flow around the headgate of Porter's ditches through the premises of McCall and onto those of Hough and Kittredge, and to thereby secure to them water for irrigation purposes which they might otherwise be unable to receive. There is cogent testimony tending to support these averments, especially when considered in connection with the showing made in the ex parte proceedings in the case of State ex rel. v. Small (49 Oreg., 595). From the testimony it appears that Small was diverting much more water than was required for the irrigation of his lands, the surplus of which was flowing onto the lands of the plaintiffs named, thereby depriving the Porters of the use thereof; and the showing made in the ex parte proceedings discloses that this method of diversion and use has been pursued by Small each year since the institution of this suit. But whether such collusion exists or not, it is clear that to recognize the demands made in plaintiff's reply as to Small's rights, together with an admission to the same effect made at the trial, would have the result which the Porters insist was intended by the alleged conspiracy.

The situation as thus developed not only demonstrates the wisdom of the course pursued by the trial court in requiring all persons interested to be made parties but that much discretion must be allowed the court in applying the facts to the issues intended by the parties, as well as to those contemplated by the court in making the order under which they are before us. Since the cause is tried de novo here, this court necessarily has the same discretionary powers in this respect. And in the exercise of this discretion, therefore, the court may, when all parties are properly before it, deem the pleadings amended to conform to the facts presented by the record.

80. But, owing to the difficulties likely to arise in the enforcement of a decree involving such questions as usually develop in a suit of this class, the court below should, in order to protect the rights of all the parties or their successors in interest, enter such supplemental decree or decrees as may be necessary for that purpose; and if at any time deemed necessary by it the court should require the sheriff or other officer or person as it may designate for the purpose, including an engineer or other assistant as may be required, to fix at the points of diversion or other proper places suitable boxes or headgates with a view to being able, in accordance with this decree, properly to measure, regulate, and distribute the water between those who under this decree may be entitled to the use thereof, the costs for which should be taxed against each in such proportion as the court may deem just and equitable.

81. It is clear, under the evidence, that this suit was made necessary in the first instance by the wrongful interference of George H. Small, who, without right during the low-water season, diverted most of the stream above S. A. D. Porter's premises and to such an extent that in order for Porter to receive his

quota it became necessary to deprive plaintiff Hough of the quantity to which she was entitled, thereby precipitating the suit originally brought. For this reason we think S. A. D. Porter and John C. Porter, as against defendant, George H. Small, are entitled to their costs in both courts, for which they should have judgment. The other parties hereto, we think, are sufficiently benefited by the final adjustment of their rights to justify each in paying his own costs.

It follows that the decree of the court below should be modified and one entered as between all the parties hereto, whether plaintiffs or defendants, establishing their relative rights in harmony with the views here before expressed.

On petition for rehearing and to reopen case. Petition denied.

(For former opinions, see 95 Pac., 732, and 51 Oreg., 318; 98 Pac., 1083.)

King, J.[1] George H. Small, by his counsel at the former hearing, aided by Benson & Stone and Lionel R. Webster, whose services have since been procured, petitions for a rehearing.

82. In support of their contention it is insisted that we are in error (1) in our findings as to the date of Small's appropriation and the quantity of water awarded him; and (2) that the case was originally tried upon the theory that each of the parties was a riparian owner, with reference to which it is suggested that this court; in its construction and application of what is known as the desert-land act (act Cong., Mar. 3, 1877, ch. 107, 19 Stat., 377; U. S. Comp. St., 1901, p. 1548), promulgated a doctrine heretofore unknown, and that, not anticipating such ruling, the same testimony was not adduced as would otherwise have been, by reason of which it is insisted that the case should be reopened for further taking of testimony.

83. It is announced, however, in the opening of the typewritten argument, that no fault is intended to be found with the law as thus enunciated, making further consideration thereof unnecessary. See also Boquillas Land & Cattle Co. *v.* Curtis (213 U. S., 339, 29 Sup. Ct., 493, 53 L. ed., —), where Hough *v.* Porter (51 Oreg., 318, 98 Pac., 1083) is cited on this point with implied approval.

The petition is accompanied by an ex parte showing by Small, consisting of his affidavit to the effect that he hired and paid an attorney, there named, to appear for him in this court, who failed to do as agreed, and that not until after the first hearing on appeal did he learn that the attorney thus employed neither appeared here nor filed a brief for him in this court. It is therefore argued that as Small was, at an inopportune time, compelled to employ other counsel, who, on account of the brief time then remaining and for other reasons given, were not in position to give his interest the attention essential to a full presentation of his rights, his claims were not fully presented, and that his interests are by reason thereof materially impaired.

84. This point we do not deem well taken. We are aware, however, that by being compelled, while litigation is pending, to make a change in attorneys often results in much embarrassment to the party thus affected. But such occurrences are not unusual, and it is obvious that to make such inconvenience a basis for granting a rehearing or for a reopening of a cause for further proceedings could but result in establishing a precedent which, in place of facilitating business and promoting justice, would too often tend unnecessarily to increase the labors of courts and in the delay of the always to be desired early determination of legal controversies without corresponding benefits to the contestants. While at the first argument in this court the petitioner was not represented by counsel, he was at the reargument thereof represented by able counsel, who filed briefs in his behalf, asserting clearly and concisely upon both the law and facts his claims under the doctrine of adverse possession and prior appropriation, these being the grounds upon which he still maintains his rights.

84½. Again, his situation, with reference to counsel, is not unlike that of practically all others whose interests, with his, have been determined; for, with the exception of W. J. Moore, whose name appears on appellant's brief only, and J. C. Rutenic, who came into the case after the taking of the testimony in the suit as first brought by Annie C. Hough, none of the counsel who appear for the contestants in this court were connected with the trial in the court below. Furthermore, recognizing the disadvantages under such circumstances necessarily accruing as a result of a change in attorneys, together with the voluminous record, and corresponding opportunity for oversights and errors in the

[1]Appointed associate justice Feb. 12, 1909.

preparation of briefs and in the presentation of the cause on appeal, extraordinary precautions were taken here for the protection, in this respect, of not only all who appeared by counsel, but for the safeguarding of the rights of the numerous parties not represented by counsel (see 51 Oreg., 366; 98 Pac., 1108), by carefully examining into, and in the preparation of a synopsis of, the testimony bearing upon the numerous and conflicting claims and interests, respectively, of all parties to the suit. But notwithstanding the thorough investigation made in this respect, we have, in connection with the petition for rehearing and points there urged, again carefully examined the record, with the result hereinafter indicated.

85. Counsel for Small maintain that we should have held him entitled to a greater quantity of water than here awarded him, in reference to which it is asserted that he has established title by 10 years' adverse use thereof, and that the testimony clearly discloses an appropriation and actual application, prior to 1884, of a much larger quantity of water than the entire amount decreed him. The conclusion reached in the main opinion as to Durand's claim as an adverse user (51 Oreg., 433; 98 Pac., 1107), including the reasons given therefor, applies with equal force to and disposes of Small's contention on this point.

86. It is argued in connection with his claim as to the date of his appropriation that the admission in Small's testimony relative to the filing of the declaratory statement, made in connection with this desert-land entry, should not be taken as having any bearing upon his testimony fixing the date of his original diversions and appropriations. His sworn declaration, filed at the time, after stating that the land was desert in character and would not produce crops without irrigation, etc., adds: "That no portion of said land has ever been reclaimed by conducting water thereon * * *." This declaration, it is admitted by Small, was filed by him in the land office in the spring of 1884, and when construed along with the direct and positive testimony of other witnesses, to the effect that the ditch constructed for use on this land was not commenced earlier than 1884, some fixing it at a later date, can leave but little doubt upon the subject.

87. Nor are we able to agree with counsel for petitioner concerning the second point presented. If all, or even a large per cent, of those whose interests here involved were petitioning on that ground for the reopening of the cause, we might feel disposed to acquiesce therein, but Small is the only party to this proceeding seeking either a rehearing or reopening thereof. Assuming that his interests were not properly represented, and that his cause was tried under the adverse circumstances suggested by his affidavit and argument of his counsel, we would be impelled, in response thereto, to take into consideration the fact that this suit, when compared with the effect of the delay incident to the petition under consideration, has been pending in the courts for 10 years; that such delay has not only, to a large extent, resulted thus far in a denial of justice to many whose interests are involved, but that during the many years which have elapsed since the testimony was taken death has removed not only some of those most vitally interested but other important witnesses as well, to say nothing of those who, during that decade, may have moved to parts unknown, thereby depriving the litigants, satisfied with the result heretofore announced, of the additional testimony likely in the event the cause should be reopened to be desired. It is obvious, therefore, that at this late date, in the absence of some extraordinary showing therefor, it would be very inequitable to permit a few of the parties to the suit remaining in the vicinity of the property involved, who may be dissatisfied wth the result, to furnish additional testimony on their part, while others, for the reasons stated, would not have an equal opportunity to rebut such evidence as may thus be offered. It is evident, therefore, that less injury is apt to ensue from a decision upon the testimony presented and before us, taken when all parties in interest and their witnesses were living and available, than to reopen the cause.

Under the fundamental law of our land all persons are entitled by due process of law to protection in their property rights, and to a speedy hearing of any controversy in respect thereto. (Constitution Oregon, art. 1, 10.) It is clearly manifest, therefore, that, after this cause has dragged along through the courts for a decade, to remand it to the court below for another indefinite journey would not only be to disregard the letter and spirit of the section of the bill of rights cited but in effect to declare it obsolete. And in this connection it should not be overlooked that during the many years which have elapsed since *the institution of this* proceeding some have been deprived of the use of water

to which they were entitled, while others, and prominent among them this petitioner, have received much more than their legal quota, for which reason, if for no other, without discovering more than ordinary reasons therefor, we would not be justified in again delaying the final determination hereof.

88. But there is another and more potent reason why petitioner's demands in this respect should not be granted. The only parties if any, to which the skillful arguments presented by this counsel can under any system of logic be deemed applicable are making no complaint as to the result heretofore announced. They do not seek a rehearing or reopening of the cause in any manner, and the reasons presented therefor by counsel for Small can have no application to his situation. The cause was tried by some, it is true, upon the theory that the doctrine of riparian rights, with reference to irrigation, prevailed and was applicable to their lands, but not so with petitioner. He sought to defend as an adverse user and prior appropriator only, his pleadings being held sufficient for that purpose (51 Oreg., 424, 433, 438, 439; 98 Pac., 1104, 1107, 1109), and his proof not only went to the question of adverse possession, but to prior appropriation as well; his efforts in this direction being, to say the least, as ably and as fully presented as is usual in cases of this kind. Much testimony was offered on his behalf for the purpose of establishing the dates of his settlements, of his filing, of his final proof, of the initiation of his various rights, the size of his ditches, the quantity and character of land irrigated, including the quantity of water required for the proper irrigation thereof; and it is evident therefrom that he relied in his proof principally upon his claim as a prior appropriator, even to the extent of securing a stipulation to the effect that he was prior in time and superior in right to the plaintiffs. (See 51 Oreg., 338, 424; 95 Pac., 737; 98 Pac., 1104, 1109.)

89. The same may be said of the few others who have informally, and not in compliance with any of the rules of this court, presented and signed a statement suggesting that Small's petition should be granted, for which reason their request, even if legally entitled to consideration, is devoid of merit.

In our first opinion (51 Oreg., 380; 95 Pac., 751) we stated that, since the cause was "tried largely on the theory that riparian rights have attached to the lands, the evidence seems inadequate for the purpose of making an equitable distribution under that rule," which statement we supplemented with suggestions as to the character of proof desired in that connection; but we subsequently held the doctrine or riparian rights to be inapplicable to any of the rights involved. Had we held to the opposite view, then, for the reasons there suggested with reference to the proof necessary for distribution among riparian owners, it would probably have resulted, sua sponte, in remanding the cause for the further taking of testimony; but when the question of riparian rights became eliminated, the reasons for the taking of additional testimony ceased.

90. It is nothing unusual for litigants to discover, for the first time on appeal, that they have tried the cause on a wrong theory in the court below, and especially is this true in suits in equity; but, whatever may be the hardships occasioned thereby, none by reason thereof have resulted in the case under consideration. (See 51 Oreg., 439; 98 Pac., 1109.)

91. It is evident, however, from an inspection of the record, that this cause, like most water suits, was tried upon the theory that each should avail himself of what defense the court, after trial, might discover he had, and, as a result, some pleaded all defenses and rights available, with the apparent hope and expectation that they might, at least, come within hailing distance of some of them; and this dragnetic system of pleading and proof is not unusual in the trial of this class of cases. Pursuant to such policy, the litigants appear, so far as deemed essential, to have introduced all evidence at hand deemed likely to have any bearing upon the case, regardless of the claim of right or defense under which their proof might eventually be classed, the principal defect in which, as indicated, was that the proof offered was insufficient to enable this court to make an equitable adjustment of the rights of the respective parties in case they were to be determined under the riparian doctrine, as anticipated by some and as subsequently attempted by the trial court. True, the showing made at the trial by some of the parties to the suit, under the issues subsequently held inapplicable, was very meager and indefinite, but, as hereinbefore stated, none of those injured thereby, if any, are complaining, from which we must infer *that* they are satisfied with the result; and certainly Small, who fortunately is *not thus situated*, is not in a position to complain for them, especially since *their lack of diligence* at the trial, it is clear, in no way works to his prejudice.

92. It is next maintained in the brief last filed in support of the petition for *hearing that, since* the beneficial use and the needs of the user are held to be

the limit of his right, and that we have fixed minimum and maximum quantity reasonably required for the proper irrigation of any of the lands involved at from 1½ to 3 acre-feet, such quantity "might be too much for some of this land and not more than half enough for the other," by reason of which it is argued that additional testimony should be taken to clear up, in this respect, the demands and requirements of each, by ascertaining "the actual facts, and leave nothing to general conjecture or vague supposition." This contention manifestly overlooks our holding upon this subject, to the effect that, when the water is not required by one or more, it shall be at the disposal of others. (51 Oreg., 438; 98 Pac., 1109; Gardner *v.* Wright, 49 Oreg., 609, 637; 91 Pac., 286, 297.) If, therefore, 1½ acre-feet is not required by some for the proper irrigation of their lands, the surplus must be available for others. For example, if one of the parties requires but a half acre-foot, or one-third of the minimum quantity awarded, to properly irrigate his land, the supply remaining must be subject to use by others; and, again, if, after each shall have received the supply of water awarded him, if there is sufficient for that purpose, any surplus shall remain, such surplus, whatever it may be, as between the parties hereto, comes within the same rule, and accordingly becomes available for their use in the order of the priorities heretofore determined.

93. Anticipating the obstacles from time to time likely to arise in this respect, as climate and soils may change, and also being mindful of the fact that the evidence on some points is not as full and explicit as it might be, to say nothing of the unforeseen difficulties which in time always make their appearance in such cases, ample provision was made in our former opinion (51 Oreg., 444; 98 Pac., 1111) for the entry of such supplemental decree, or decrees, not inconsistent with the views announced, as may at any time be found essential to meet emergencies as they may arise. The order of priorities, proportionate interests, and limitation of the rights of each of the litigants are determined; but the question as to when a water user may be deemed to be acting within or without the scope of the decree, including the best manner and method of its enforcement, may make it necessary at times in order to carry the spirit of the decree into effect for the court below to require further evidence upon the disputed points. For example, it might become necessary from time to time to gather information concerning the acreage irrigated; as to what tracts require water; quantity necessary for the proper irrigation thereof; the best and most effective method of distribution; quantity of water available; amount actually applied, etc. (See 51 Oreg., 380, 444; 95 Pac., 151; 98 Pac., 1101, 1111.) All of which may be done by and under the direction of the trial court, as in other cases, or in the manner recently provided for by legislative enactment. (See Gen. Laws 1909, p. 329, ch. 216, p. 36 et seq.) Evidence for such purposes, owing to its nature, will always be available, and accordingly is not subject to the objection hereinbefore alluded to in response to petitioner's demands. It is obvious, therefore, that the emergency advanced for reopening the cause at this time for the purpose of securing the class of evidence suggested as desirable is fully recognized in our former opinion, and provision will be made therefor in the decree to be entered here, making such proceeding at this time clearly unnecessary.

94. There is another feature, however, to which our attention has been directed with reference to which we are inclined to adopt counsel's view. Since filing the main opinion the Porters have placed on file with the clerk of this court cost bills, taxing against Small, and in their favor, the costs alleged to have been incurred by them in both courts, aggregating the sum of $2,046.70, from an inspection of which it appears there is included the witnesses' fees, including mileage of nearly all who testified in the case in the court below. This is evidently attempted upon the theory that as all whose fees are thus taxed gave testimony which directly or indirectly had some bearing upon the Porters' interests, their mileage and per diem should be included in the cost bill in their favor. Why the costs incurred in the court below are taxed here does not appear, nor can we surmise a reason therefor, unless it is upon the theory that since the statute provides that suits in equity shall be tried de novo on appeal, it amplies that all cost bills must be filed in this court. Such is not the usual practice; but whether it is the proper procedure in such cases is not before us, and accordingly will not be determined. But the cost bills filed illustrate the difficulties to be presented if costs are to be taxed in the manner heretofore directed. In fact, it is manifest that the obstacles to be encountered in determining, under our former holding if adhered to, the proportion of costs in the lower court to be taxed against Small makes an equitable

adjustment thereof very difficult, if not impracticable, and would probably result in requiring Small to bear too large a burden in this respect, thus partaking of the nature of a punitive rather than an equitable assessment thereof, which was not intended. Since all the parties to the controversy are materially benefited to the extent, at least, of having their rights finally determined, even though the result in each particular case may not be what he or she have expected or desire, we think after a careful reconsideration thereof the court below was fully justified in decreeing that none of the parties recover costs in that court. Porters' judgment against Small for costs and disbursements will therefore be limited to those incurred in this court.

The petition is denied.

Eakin, J. (concurring). Since filing the motion for rehearing we have reviewed the issues and evidence relating to the appropriation of water by Small.

95. Small claims 800 inches of water through three ditches on the west side of Silver Creek. Ditch marked "No. 1," on a map not before us, is what is known as the ditch from Bridge Creek, and No. 2 and No. 3 are taken from the island branch near the center of the northeast quarter of section 15. He says ditch No. 1, with a capacity of 200 inches, was constructed in 1881 to take water from Bridge Creek to his desert-land claim in section 9 and section 10 (560 acres). He is very indefinite as to the details relative to the construction and use of the ditch, its fall, the particular ground covered by it, and the crops raised. He testifies that ditches No. 2 and No. 3, with 300 inches and 250 inches capacity, respectively, were constructed in 1882, No. 2 being also for the purpose of reclaiming the desert land, but he is equally silent as to details of these two ditches, and his evidence simply amounts to a general statement that in 1881 and 1882 he diverted through these ditches 750 inches of water. He admits that a large tract of this land was not fenced until 1885. In his answer and his evidence he claims to be the owner of 1,960 acres of land, all of which was irrigated from this creek, claiming 800 inches of water therefor, and that all has been irrigated since 1882, and that one-half to three-quarters inch of water per acre was sufficient for that purpose. It appears from the evidence and a plat submittted with this motion that he owns only 1,400 acres, of which not more than 820 acres are under the three ditches above mentioned. Five hundred and sixty acres of the 820 comprises the desert-land claim, for the location of which he did not make application until 1884 and which was not fenced until about 1885. Hence at the times he states he was claiming 800 inches of water he only had a legitimate claim to 260 acres under these ditches, which tends strongly to weaken his evidence as to the time and amount of the appropriation.

S. A. D. Porter testifies that the first water taken by Small to the desert-land claim was in 1886—Jesse and James Porter in 1886—at Small's request, and jointly with him measured the quantity of water flowing in ditches No. 2 and No. 3, and the amount did not exceed 50 to 75 inches in both, and the ditches were about half full, Small at that time contending that was all the water he was taking or claimed. He evidently constructed these ditches for the purpose of reclaiming the desert land, though he says he had other land to irrigate. He does not mention what land or state that he took the water upon any particular land. It also appears that part of this land was swamp land in 1882, and it is not reasonable to suppose that it required irrigation until reclaimed. We think the determination in the original opinion of his interest is fair and just.

I have here treated Small's rights exclusively with reference to his title by prior appropriation. He also relies in his answer upon title by adverse possession, but there is no evidence indicating that his use of the water interfered with the other users prior to 1895, and therefore such use is not adverse under the rule in North Powder Co. *v.* Coughanour (34 Oreg., 9, 22; 54 Pac., 223), Carson *v.* Hayes (39 Oreg., 97, 106; 65 Pac., 814), and Beers *v.* Sharpe (44 Oreg., 386, 394; 75 Pac., 717). The use of the water of a stream for irrigation can not become adverse to another claimant of it, unless such use infringes upon the right of the other and curtails his use.

Small, therefore, has acquired no title by adverse possession. The motion should be denied.

Mr. KING. I just want to say a few words more for fear I might be *misunderstood.* As I said in the beginning, I am not authorized to *speak for the* Secretary of the Interior or for the Reclamation Serv-

ice on this question. I come before you as a citizen of Oregon interested in the irrigation section of the State and the West in general. I was born in eastern Washington and have lived in eastern Oregon most of my life. Hence I am familiar with the irrigation problem.

If I may be pardoned for referring to myself, I will say that in 1893 I introduced and secured the adoption by the Oregon Legislature of an amendment to the constitution of Oregon, on the subject of irrigation. Three years later I prepared, introduced, and secured the passage of the Oregon irrigation district law. That possibly had the effect of making me a crank on the subject. But, as some one has said, cranks help to move the world, and if I can assist in moving this thing along I will have no apologies to offer.

I want to say that the irrigation district law, together with the House bill introduced by Congressman Smith, of Idaho, which gives to the irrigation district a lien upon the lands within an irrigation district, whether such lands be public or private, with proper amendments by this Congress or any succeeding Congress, will go a long ways toward solving the reclamation problems of the West. In fact, I think it will be the ultimate solution of the entire problem, without the Government running any material risk of losing any money. Of course, even in our reclamation projects we are bound to lose some money. There is always a certain percentage of loss. We have already had some losses, but they are comparatively small. Private enterprise would probably have lost as much, if not more, under similar circumstances.

Senator WALSH. I am impressed with the idea that the plan is a most excellent one, that the conduct of this work by the local authorities, subject to supervision by the very people who will be called upon to pay for the work, is a most desirable one. If there was something in the way of general supervision by the Federal authorities it would be exceedingly helpful. I believe that many of the evils of the present system, the mistakes that have undoubtedly attended its operation, would be eliminated by some such plan as this. The House bill, as I understand it, proposes some plan by which public lands may be included within the taxable area.

Mr. KING. Yes, sir.

Senator WALSH. That is to say, the Government as an owner of the lands occupies the same attitude as other owners of land within the irrigation districts.

Mr. KING. Yes, sir.

Senator WALSH. And would be called upon to pay its regular assessment?

Mr. KING. Yes. The lands would eventually pay out. The Government assumes no obligation. It becomes merely an obligation which follows the land, and the land only. There is no constitutional question involved in the other bill. I would like to be heard on that bill when it comes before this committee.

We have here ex-Gov. Hawley, of Idaho, one of the most prominent lawyers in the West, who, I hope, will appear before you and give you the benefit of his views on the subject. I want to say in concluding that while I do not want to be understood as indorsing the bill as it stands, with the proper amendments I, as a citizen of

the West, am strongly in favor of it, and I am ready to assist in making such amendments as may be found necessary. I think a bill in this direction will be most helpful in solving the problems of reclamation in the West.

Senator WALSH. Suppose we were able to work out the other bill, the House bill, in such a way that the public lands in the district should bear their fair proportion of the cost, would you need this bill?

Mr. KING. Well, there would not be so much necessity for this bill in that case, owing to the fact that the Government would have its engineers to pass upon the projects as to their feasibility, and that would put life into them so that private projects could be built where they can not now be built. But that bill would solve the problem in part only. We need both. Each is essential to the complete success of the other.

If the Government would secure the payment of the interest only, this would doubtless insure the sale of the bonds at their par value. To do this would require no more exertion on the part of the Government officials, and no greater risk than exists under the national bank system. I believe that by the adoption of some system in this direction every district will be enabled to build its own project if it is feasible, or to use our favorite Oregon motto, each would "fly with her own wings." (Alis volat propriis.)

Senator JONES. Could you not suggest in connection with your remarks any amendments that occur to you that ought to be made to the bill, so that they can be considered when your remarks are read by the members of the committee?

Mr. KING. Yes. I can do that in a few minutes.

Senator WALSH. You might address a letter to us.

Mr. KING. I might address a letter to you covering the things that I have not had time to go into here or that have not occurred to me at this time. But will add, while on the subject, that I think the Government should send its engineers to inspect the projects and that the cost of doing so should be charged to the projects and that provision for doing the same should be made in advance. Another thing is that the Government should take charge of the project to be protected by it and operate and control it until 51 per cent of the principal is paid, charging up the operation and maintenance just as it does now.

Senator JONES. Under the reclamation act?

Mr. KING. Yes; under the reclamation act. And when that is done no chances will be taken. Under the irrigation district system you have the entire taxing power of the State behind it to enforce the collection, and if the project is passed upon as feasible, we are taking no greater chances than we are now taking in any project that the Government might initiate. I might be inclined to suggest a little larger interest in order to provide a 1 per cent sinking fund each year for, say, 25 or 30 years, to pay out the entire amount.

Senator WALSH. You spoke about the value of Government supervision.

Mr. KING. Yes, sir.

Senator WALSH. Now, you suggest Government operation for a *brief period.*

Mr. KING. That would be my idea.

Senator WALSH. Now, suppose that for any reason, economic or otherwise, it was deemed inadvisable to guarantee the bonds of the district. Would it be of any service to provide that the Government Reclamation Service, upon the application of any district, might make an examination——

Mr. KING (interposing). Yes.

Senator WALSH. And report, and might also upon invitation of the district take over the work of construction and operation upon terms to be agreed upon between the district and the Reclamation Service?

Mr. KING. Yes, sir; that would be the safest and most effective plan.

Senator WALSH. Would that be of service?

Mr. KING. I think it would materially assist; and would make it doubly sure and eminently satisfactory to 90 per cent of the districts.

Senator WALSH. It occurred to me that that could be done without any trouble at all because we have a force, the reclamation force.

Mr. KING. Yes, sir; but to remove any doubt on the law we should be given express authority by Congress to do so.

Senator WALSH. And it seems to me that we could employ that force in work of that character with a view to reducing the overhead charge, as it might be expressed. I dare say that that would be entirely justifiable.

Mr. KING. I think so. There are quite a number of those things that I have in mind, but I do not want to burden Senator Jones's bill with all of my ideas.

Senator JONES. That is all right. We want the bill improved in every way possible.

Mr. KING. I have a plan along that line worked out, but I hesitated to prepare a bill, or even suggest it, because these matters usually come through the department. That is one of the reasons why I cautioned you that I am only speaking as a citizen of Oregon and the West, and not for the department. Personally, I think a good way to do this would be to give to the Secretary of the Interior full authority over the matter, except to require certain investigations to be made by his engineers before acting in order first to determine the status and feasibility of the project.

I think with proper safeguards along this line it should be left to the Secretary of the Interior, with the consent of the district, to take full charge of the management of the district, coming under the law, and handle same as is done with irrigation projects under the reclamation act, accompanying such provisos with authority to guarantee both interest or principal until the major part of both have been paid, when in the discretion of the Secretary the management would be turned over to the district. Even if it were provided that no guarantee except payment of 50 per cent of the interest is made, the mere fact that the management of the district, collection of the operation and maintenance fees, collection of interest, would be by the Government, as is now done—through the Reclamation Service—would inspire such confidence, I think, as to place the bonds on practically a par basis, or so near it as to make the reclamation of millions of acres a success, where under present conditions they may go unreclaimed for generations.

I also think it highly probable, and that is the opinion of quite a number of others with whom I have considered the question, that if the Secretary were authorized—removing thereby all doubt as to the law—to make the proper investigations, and after being satisfied of the feasibility of a district or districts to take charge, operate and maintain the same, to collect the expense of operation and maintenance thereof, together with the interest to fall due, acting thereby in the nature of a trustee for the collection of such interest and payment thereof to the holders of the bonds, the bonds would be worth not far from their par value, if not full par value. Illustrative of this, I again refer to the offer which has already been made to the reclamation commission, wherein the holders of bonds on a very fine district in Nebraska, which is bonded for not more than half the value of the lands, offer to reduce the principal from $2,203,000 to $2,000,000, and take 4 per cent per annum interest in place of 6 per cent, the entire principal and interest on that basis to be paid on the same basis as the 20-year plan provided in the reclamation extension act, if the Reclamation Service, by agreement with the district, will take over, operate, and maintain the district, collecting the operation and maintenance fees, together with interest, which on collection will be turned over by the Secretary to the bondholders. No further obligation would be incurred by the Government, yet it appears that the confidence in the effect which the operation and maintenance by the Government would have upon the value of the bonds is deemed by the bondholders sufficient justification for making the reduction mentioned. I think the Secretary should be authorized to pursue either of the courses suggested—leaving it to his judgment to adopt the plan which appears most adapted to the situation when presented.

Senator WORKS. Judge, I wanted to ask you whether any of these projects that are intended to irrigate private lands, only, have ever been approved by Congress in any way, or whether it is simply department construction work.

Mr. KING. I do not know of any private projects that have been expressly approved by Congress, but impliedly all have been. We are dealing with irrigation districts in the State of Washington——

Senator WORKS (interposing). I only asked about that for information.

Mr. KING. I did not understand whether you had reference to irrigation districts or Government projects.

Senator WORKS. I am speaking about Government projects which are intended to irrigate private lands only, whether they have been approved in any way by Congress.

Mr. KING. If you will permit me to answer that in my own way I will say this: That Congress has not passed any laws or resolutions dealing with any irrigation projects that are not connected with the Government. Our most successful deals are through the irrigation districts, because it accomplishes more and costs less money. Now, the Carlsbad project, for instance, is practically completed, and they are all private lands.

Senator WALSH. The Reclamation Service makes an annual report to Congress, and it has told Congress that there are no public lands in that project.

Mr. KING. Yes, sir.

Senator WALSH. And so the information has been conveyed to Congress from time to time.

Mr. KING. Yes, sir.

Senator WALSH. And last year, I dare say, an appropriation was made by Congress to complete that work.

Mr. KING. I think that may be conceded a completed project. The Orland is a completed project. Of course it had a little corner of public land. Of course if you put in a little corner of Government land it does not affect the legal status of it at all. It is, as we all know, well settled that we can not legally do indirectly what can not be done directly.

Senator WORKS. I thought I was pretty well acquainted with what has been done by the Reclamation Service, but I am astonished to know that the Interior Department has gone to the extent of spending the Government money for the purpose of irrigating private lands only.

Mr. KING. Now, Senators of this committee, I want to say that Congress has not only recognized the right to do this in various ways by receiving these reports, but it passed a law expressly providing for the building of private projects in the State of Texas, where we have no public land at all. So that, so far as congressional interpretation and approval is concerned, Congress has passed on that question time and again, each time recognizing, impliedly at least, the constitutional right to do so.

Senator WALSH. But I understand you to say, did I not, that the Texas project is only a portion?

Mr. KING. I know we have not attempted to reclaim any lands in that State where they are all private lands in the project, but the act authorizes it. That is one of your many congressional interpretations, so far as constitutional questions are concerned.

Senator WALSH. That is, you can establish an entirely separate project?

Mr. KING. Certainly, you can do so under the act, if constitutional.

Senator WALSH. A separate and distinct project was never undertaken in Texas where only private lands were to be included?

Mr. KING. No, sir. It has not been necessary so far. However, that does not affect the legal status, so far as congressional interpretation of the constitutional question may be concerned.

Senator WORKS. Was that law enacted to cover lands in other States?

Mr. KING. The originators of the act secured its passage for the purpose of taking care of private lands in Texas, regardless of lands, whether public or private, in New Mexico and other States. The act itself does not specify private lands anywhere, except in the State of Texas. The act itself so clearly authorizes the reclamation of private lands, wherever they may be, whether in adjoining States or elsewhere, regardless of public lands, that it is not subject to interpretation.

I thank you gentlemen for being so patient with me on these matters.

Mr. RICE. The next speaker to be heard is Mr. Corlett.

STATEMENT OF MR. GEORGE M. CORLETT, OF BUENA VISTA, COLO.

Mr. CORLETT. I am a lawyer, and I live at Buena Vista, Colo. I am here at the request of Gov. Carlson and the irrigation districts in Colorado.

I will not attempt to discuss in any way the constitutional questions, because I am not advised as to that, but on the ground of policy I might be able to state some facts or give you some suggestions. This irrigation district act was based on the Wright Act out in California. Our State passed a similar act very soon afterwards, and our first irrigation districts out there were successful. I have organized a number of irrigation districts, and I think all but one of them are in successful operation at the present time. That one came along later after the securities of irrigation districts came into disrepute.

I have talked over this matter with a good many purchasers of such securities, and a condition has arisen in which it is impossible to place irrigation securities in Colorado. I presume that the same condition exists in the other Western States. It is practically impossible to place irrigation securities on almost any kind of a basis. The investors say that, although the project may be altogether feasible, and there may be no question about the worth of the securities, still, it is a security which the people do not want, and they can not handle it.

The conditions became so acute out there that a little over two years ago they called a meeting of governors in Denver, and I think the governors of all the irrigation States were represented there. They also had a number of irrigation men from different parts of the West, including the Assistant Secretary of the Interior, Mr. Jones, and Mr. Tallman, the Commissioner of the General Land Office, and Mr. Dudley, of the right-of-way department. They were called together for the purpose of seeing if something could not be done to help out this condition and to revive the irrigation securities.

In fact, gentlemen, it got so bad out there, as I told the meeting up here at the hotel the other day, that our State bank examiner would come around to the banks there, as a banker told me, and take a pair of tongs and set the irrigation securities over to one side so as not to contaminate the other securities.

The governor and all the people out there think that something ought to be done so as to allow the good projects to be finished. Now, I am not so anxious to start any new projects at this time. Of course, there is lots of land that ought to be reclaimed, but there are a lot of these projects that have not yet been finished; they have unfinished work on hand.

Senator WORKS. Has the question of State aid ever been considered?

Mr. CORLETT. Yes; the question of State aid has been considered; and this meeting of the governors out there was for the purpose of arriving, if possible, at some agreement between the Reclamation Service and the State, whereby the two might cooperate in some way or other.

As I understand it, the Jones bill is an outgrowth of the conference there. The Secretary of the Interior, as I say, was represented

there, and we talked over the matter for two or three days, and, although they did not arrive at a definite proposition at that time, there was something of this sort considered at that time. I do not know whether the Jones bill will do everything that it should do, but I will say that the Jones bill, especially if supported by the passage of the Smith bill, is the best solution that anyone has been able to work out up to this time, I believe. We have a bill practically identical with the Smith bill in Colorado relative to State lands, and the State lands are made subject to the irrigation tax, provided that the State land board record collects the assessments from the leaseholders or from the certificate-of-purchase holders; it is paid in to the State land board and they pay it in to the county treasurer, just as the Smith bill provides that the entryman shall pay the amount of the assessment into the local land office before he receives his final certificate or at the time he makes his actual purchase.

Now, the Jones bill, we think, will have this effect if it is passed: We do not want the Government to pay for our irrigation systems out there. At the same time the reason for the failure of practically all of the irrigation districts that have failed, with the exception of a very few that did not have any water supply, or really any reason for being in the first place, is that the people issued the bonds supposing that they would find ready sale for them. When they went to sell them to the public a few fake schemes had been put through and the investors had been stung and they found no market. A large number of people had settled on Government lands and bought State lands, relying upon this proposed system of State irrigation, and they found after they had gone in there and organized this district at considerable expense and possibly made a lot of improvements upon the Government and State lands, and invested possibly all they had in the anticipation of the irrigation works, they found that they could not dispose of their securities to bond purchasers, so that as a last resort they had recourse to such practices as selling bonds to contractors for inflated prices. In other words they would give a contract of this kind to some contractor. The State law provides that bonds must bring at least 95 cents. They would give a contract to some contractor at par, knowing that they were not getting more than 50 per cent or 60 per cent of the bonds. Now, the 6 per cent interest would not be so bad. Most of the propositions out there would be able to pay out if they only had to pay 6 per cent interest, but in most of those projects in which they go to water or inflate their bonds they can not pay double for that proposition.

Senator WORKS. Does your Colorado law permit that use of the bonds—turning them over to contractors?

Mr. CORLETT. No; it does not. But I say that in a good many instances I presume it was done—that contracts were let out at very high prices. It is generally known that such things were done. It is common knowledge. I dare say it has been done in California.

Senator WORKS. Yes; but it has been held to be an illegal disposition of the bonds.

Mr. CORLETT. Oh, but where it appears legal on the face of it I expect that a good many of them have this kind of security. I will say that in the seven irrigation districts that I have organized in the State of Colorado there is not one that has that sort of contract.

There is one that I have on hand at the present time that has been organized for three years and they have not done anything because they could not do anything without going out and discounting their securities in that sort of way. There are 100,000 acres in that district and they are attempting to go ahead on the assessment plan and make an assessment every year for construction purposes. It is a drainage and irrigation project combined. It is going to take those people six or eight years, in which they will live on the ragged edge of starvation, before they can get their proposition in any kind of shape to make a success of it.

Senator WORKS. I have no doubt in the world, looking at it from the standpoint of the irrigation district, that the Jones bill is an excellent piece of legislation. The two things that are confronting me are, first, whether the Government can constitutionally do it, and in the next place, whether it would be a good policy on the part of the Government. Here we are proposing to guarantee the interest on the bonds of corporations that exist only in a few of the States and for a specific purpose. There is no reason that I can see, from a constitutional point of view, why any private corporations in the country could not supply water to the public just as in the case of the irrigation districts. How far can we go in that direction? How far is it good policy on the part of the Government to go in guaranteeing the obligations, whether for irrigation districts, private corporations, towns, or cities? That is the side of it that appeals to me.

Mr. CORLETT. I will not answer on the constitutional proposition——

Senator WORKS (interposing). Well, I did not expect you to answer that part of it.

Mr. CORLETT. But, on the other proposition, I want to say that I can not see why it would not be a good policy for the Government to help out these projects where they are started in the way of irrigation districts, where it means homes for millions of people, if it is good policy for them to go in and do the same thing under the Reclamation Service. I can not see why it would not be a great deal more to the public good to go out and help out these organizations in the States which have Government lands than to take the money that is derived from the public lands in those States and take it down here to Texas, for instance, and invest it for the development of private lands down there where the Government has never had any public lands. I do not see why it would not be a great deal more to the public good to go out here and make a bunch of homes for the people of the United States than it would to spend the same money possibly on the redemption of rivers and harbors and things of that kind.

Senator WORKS. Might you not just as well say that it would be of benefit to the Government to aid industrial corporations in the same way on the ground that it gives employment to a number of people? How far can you extend that theory?

Mr. CORLETT. Of course, you know the home proposition is a great deal different from employment. Governments go to war to provide homes for their people.

Senator WORKS. I do not know whether there is so much difference. You have got to have money to live on.

Mr. CORLETT. If they have a home they are presumed to have the material to provide them with a living. Of course, there are a great many things that we people in the West are not interested in that are done for the people in the East and in the South, and on the rivers and harbors. On the other hand there may be lots of people who may not be interested in the western lands, but you people ought to consider the needs of all the people of the United States. Now, irrigation is our essential thing. That is what we depend on out in the West. Nothing is any good if we are deprived of it.

Senator WORKS. Well, it is unnecessary to argue that proposition to western Senators. They appreciate that situation.

Mr. CORLETT. That is all I have to say. Thank you.

Mr. RICE. Ex-Gov. Hawley, of Idaho, would like to be heard for a few minutes.

STATEMENT OF HON. JAMES H. HAWLEY, OF BOISE, IDAHO, FORMER GOVERNOR OF IDAHO.

Mr. HAWLEY. I do not know that I could add anything to what has been said by the preceding speakers. I am here more as an onlooker than anything else. I attended the conference the other day and, after appointing the committees, I promised to be here and listen to this discussion.

I simply want to say this: I believe that this bill introduced by Senator Jones, with proper amendments, will do a great deal toward helping us out in Idaho and the other irrigation States. It is absolutely a necessity in order to carry out our irrigation projects to have some guarantee in regard to the interest or principal of the bonds before they can be successfully disposed of. I know of no other way of obtaining that except in this particular manner, because we are prohibited from doing it under our State constitution. It we could, under the constitution of the State of Idaho, place these matters in the hands of the State land office, or the State engineer's office, I do not believe there would be any objection on the part of the department or the State, so far as the principle is concerned. But I do not see any way of managing this matter of protecting the benefits that accrue from the reclamation projects to be started in these districts except in some such way as this. Of course, there are constitutional questions involved, matters that I have never inquired into. I do not know of anything that I could say to add to what has been better said by Judge King and the witnesses who have been before this committee. Those are matters that naturally appeal to a man who is a member of the legal profession.

I would suggest, gentlemen, in the consideration of this matter—I do not know whether it will have any weight, because possibly it is too far-fetched—that as a matter of public policy the Government should have the power to guarantee bonds of an irrigation district, because anything that assists in settling up these arid and swamp lands, that extends the cultivated area, that permits the settlers to come in and build up that particular jurisdiction, increases the taxable wealth of the country and the population as well, and redounds not only to the benefit of the particular section but of the entire

country. I believe that, as a matter of sound public policy, if a scheme could be devised by which, the Government assisting, new sections of the country could be developed—and necessarily they would be developed—that there would be an increase in our population and our taxable wealth; that it would be not only to the interest of that particular section but to the interest of the entire country to have it done. It would be a proper exercise of congressional authority and the proper way of taking chances, perhaps, on expending some of the Government money.

I simply mention this as a question of public policy which might be taken seriously into consideration when it comes to the legal aspect of the case. If we can add to our population and build up the tax rolls, does it not redound to the interest of all the States and, therefore, would it not be, as a matter of public policy, proper for the Congress to so consider it? I simply offer that as a suggestion, without having gone into the constitutional questions involved.

Senator WALSH. How generally have the people of your State availed themselves of the opportunity to organize under your irrigation-district law?

Mr. HAWLEY. There are a great many of the irrigation districts organized in different parts of the State. Some parts have been very successful. Others are in an inchoate state, because they are unable to obtain the means to exist. There is no sale for the irrigation bonds. A few years ago they could dispose of them, but, owing in a great measure to the failure of some of the Carey Act projects the bonds have rather come into disrepute. It is absolutely impossible to sell those bonds at a figure that will enable the district to go on with its work without vast expense.

Senator WALSH. If the constitutional amendment was submitted to the people of your State authorizing the State to guarantee these bonds, do you think it would carry?

Mr. HAWLEY. I think it would, without question. I think if the constitutional amendment was submitted permitting the State to guarantee those bonds, always provided that a proper tribunal was selected who should decide on the questions necessarily involved in the construction of the works, that it would pass the legislature. I do not believe there is a legislative assembly that has met there in the past or that will meet in the future that would not be willing to do that.

Senator WALSH. You have a strong engineering department as a part of your State government?

Mr. HAWLEY. We have.

Senator WALSH. You could very safely intrust to that department the feasibility of constructing these works?

Mr. HAWLEY. I think so. In fact, I do not know of any State in the West that has a more dependable force than we have in the State of Idaho, and have had for a great many years. I think we all realize the benefits that will accrue from a measure of this kind. I think public sentiment needs only to be awakened to the situation. If public sentiment were awakened, it would lead, I think, to universal acquiescence in the idea. But that does not avail us now, because before a constitutional amendment can be submitted to the *people, the legislature* has got to meet, and that means that two years

have got to elapse before the legislature can take it up, because it has to be voted on by the people at a special election.

Senator WALSH. Can you initiate amendments in Idaho?

Mr. HAWLEY. No, sir. If this bill should be enacted, I do not believe that one dollar would ever be required so far as the Government is concerned. The Black Canyon district has been organized, but it is impossible to finance it. They have had a great deal of trouble in another district, one of the most fertile sections of the State, where they have a lifting system and not a gravity system, which entails a great deal of expense and a great deal of difficulty to the people. Of course the State has thousands of acres of land there and the State can come to the rescue, to a certain extent. We have had generous donations by the State government of a considerable amount of land. The State has helped along there to a certain extent. I am very glad to say that under careful management the matters will probably come out well, but that is due more to the extreme fertility of the land than to anything else.

I have met with the board of directors, not in a professional way at all, but in order to assist them in any way I could in everything pertaining to the future of the State, and I know that they issue their bonds and the men have to float them to pay them out, which entailed a vast expense that should never have accrued against the district at all. It has hampered them in every way and kept that particular section back. Some of these other districts are absolutely at a standstill. That is especially true of 100,000 acres of fertile land in the Black Canyon district, or rather land which would be fertile in any other part of the country. They are unable to build it up. The people can not take the bonds themselves without State aid or Government aid.

Senator JONES. Governor, do you think there would be any difference, so far as the purchase of bonds is concerned, between the guaranty by the State and the guaranty as provided in this bill?

Mr. HAWLEY. I am not sufficiently well informed, Senator Jones, in regard to financial theories to speak advisedly on that matter, but I think there would be a difference, and for this reason: While the guaranty of the State would be all right, I believe the guaranty of the General Government—the General Government getting behind these bonds—would enable them to be sold at par, at a much lower rate of interest, than if they had the mere guaranty of the State of Idaho, and it would make them readily salable amongst the capitalists of the East, whereas possibly you would not undertake to buy the bonds simply guaranteed by the State, because people would be afraid that complications might arise and that State authorities in the future might attempt to take advantage of legal questions that might be involved. I think a Government guaranty of the interest on the bonds would be much more advisable, so far as the good of the district is concerned, securing money on easier terms, and lessening the rate of interest. I think the Government guaranty would be more advisable than State guaranty for those reasons.

Now, gentlemen of the committee, if there are any other matters upon which I could throw any light I would be only too pleased to

do so. As I said, I did not come here with the expectation of making a set argument, but more as a listener than anything else.

Senator WALSH. While you are here, Governor, may I ask you if you have given any thought to the bill introduced by Congressman Smith from your State?

Mr. HAWLEY. Yes; somewhat.

Senator WALSH. The general principle, as I understand it, is to bring the public lands within the district to make the entryman, as he enters his land and before he acquires title, pay the same assessment as is exacted of the private owners.

Mr. HAWLEY. I think it is well fitted to be a companion bill to the Jones bill. I do not suppose any objection could arise to the Smith bill on constitutional grounds, but it certainly would cut a very important figure and would preclude some hardships that might be inflicted upon people afterwards. I am in hearty sympathy with the ideas of that bill.

Senator WALSH. It occurred to me that there was not so very much in that, because the irrigation district is created and the public lands are there and the private lands must bear the burden originally, and the bonds would have to be sold upon an expectation of return only from the private lands, except as the public lands could subsequently be brought in.

Mr. HAWLEY. Pardon me, Senator. Do you think that that would necessarily follow, that the fact that there was a lien upon the other lands in the district that are not yet reduced to private possession, that there was a lien so far as these charges were concerned, would obviate that difficulty?

Senator WALSH. Well, what I mean, Governor, is this: If there was no provision in the Federal statute at all, the entryman would get his land upon making the ordinary payment.

Mr. HAWLEY. Oh, yes, sir

Senator WALSH. Now, if he wanted to be supplied with water from the ditch, of course, the irrigation district would require of him that he pay the same amount that he would have to pay if his lands had been held originally in private ownership. So that it would work out pretty much the same way, whether the Smith bill was passed or not, except that you might find a good many who would take the lands under the ditch and would not want to make the agreement with the district by which they would be provided with the water.

Mr. HAWLEY. That is the great trouble, Senator.

Senator WALSH. That is the difficulty.

Mr. HAWLEY. That is the trouble with the Smith bill. Now, are there any further questions?

Senator WALSH. I know we have attempted to float a number of projects in Montana. Corporations have been created for the purpose of constructing ditches in the expectation that they would be able to make contracts with the owners of the land under the ditch to take the water, and it was usually found that from one-half to one-third would not make the contract.

Mr. HAWLEY. Yes, sir.

Senator WALSH. Now, under this arrangement they are practically forced to make it?

Mr. HAWLEY. They have got to do it?

Senator WALSH. Yes; that is it.

Mr. HAWLEY. Your remark applies directly to some of our enterprises in Idaho. We have got to force these people to do certain things, because—well, we have land hogs and water hogs and hogs of all kinds running around on two feet, and I am afraid we have our full share in the West, men that want their neighbors to do things and do not want to assist in the doing.

Gentlemen, I thank you.

The ACTING CHAIRMAN. Thank you, Governor.

Mr. RICE. There is one other witness, and that is ex-Gov. Gillett, of California. He is before a committee of the House this morning and can not be here. I think if we could have one more session it will be over. He can be here to-morrow morning.

The ACTING CHAIRMAN. All right.

(Thereupon, at 12.15 o'clock p. m., the committee adjourned to meet at 10.30 o'clock a. m. to-morrow, Friday, March 31, 1916.)

GOVERNMENT AID THROUGH DISTRICT ORGANIZATION.

FRIDAY, MARCH 31, 1916.

UNITED STATES SENATE,
COMMITTEE ON IRRIGATION AND
RECLAMATION OF ARID LANDS,
Washington, D. C.

The committee met at 10.40 o'clock a. m. in room 129, Senate Office Building, pursuant to adjournment, Senator Harry Lane presiding.

Present: Senators Lane (acting chairman), Jones, Works, and Catron.

Also present: Hon. J. N. Gillett.

The committee resumed the consideration of the bill (S. 1922) relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations, and authorizing Government aid therefor.

The ACTING CHAIRMAN. The committee will hear Mr. Gillett.

STATEMENT OF HON. J. N. GILLETT, OF SAN FRANCISCO, CAL., FORMER GOVERNOR OF CALIFORNIA.

Mr. GILLETT. My name is J. N. Gillett. My residence is San Francisco, Cal. I might say in the beginning that last December, 1915, there was held in San Francisco——

Senator JONES (interposing). Governor, I want it to appear in the record that you were formerly a Member of the House of Representatives for several years, and also governor of your State.

Mr. GILLETT. Yes. I have been a Representative in Congress from California and governor of California from 1907 to 1911. There was a conference held at San Francisco known as the Western States Reclamation Congress, on the 2d and 3d of December, 1915. The conference appointed an executive committee from the several States represented there in the West and I was appointed as chairman of the executive committee from California. There has been a meeting here in Washington recently of the representatives from the Western States and from all over the country in what is known as the National Reclamation Conference. I am also one of the members of the executive committee appointed by that conference. Since I have lived in the West I have given the question of the reclamation of our arid lands some thought, and I have seen efforts on the part of different people and various companies to reclaim those lands. Some of them have been successful and others have failed. There are large tracts of arid lands in the western States, large tracts in California, that are subject to reclamation and could be brought in as very valuable farm lands, capable of supporting a large popula-

tion, if some means could be devised by which the scheme necessary to bring them into that condition could be properly financed.

We have in California one or two districts in the San Joaquin Valley that have struggled along and to-day are quite successful. They formed districts under the laws of California and assessed themselves for the expenses necessary to carry on the reclamation work. They have issued bonds against the district and organized the district, and to-day, after a number of years, they are getting along fairly well. One of the great troubles that they had, though, in the early days was the question of financing the projects. For a long time their bonds were hard to sell and considered of little value. I know that for a number of years the effort was to get an act through the legislature which would authorize savings banks to accept bonds which were issued by these irrigation districts.

Senator WORKS. Governor, the difficulty about the irrigation bonds in California resulted largely from the fact that a number of irrigation districts, including some of these in the San Joaquin Valley, repudiated their bonds and attempted to defeat any collection upon them at all. Do you not think that was the principal reason why those securities were put on the black list?

Mr. GILLETT. Yes. That is one reason. I suppose that was brought about largely by the fact that some of the people there were hard up and assessments were heavy and the whole thing was not properly formed or properly officered. At any rate, that condition and the fact that some of our irrigation projects have failed, have given a black eye to securities of that kind.

Senator WORKS. But in some of those cases it resulted from the fact that they were not able to get the necessray supply of water.

Mr. GILLETT. Yes, that is true.

Senator WORKS. And their bonds became practically worthless to the owners of the lands in those districts.

Mr. GILLETT. Yes, sir.

Senator WORKS. I know that is true in the southern part of the State of California, and I think it was true in some of the San Joaquin Valley districts.

Mr. GILLETT. That is true. That is one of the things that should be guarded against and protected against, which I think this bill does. Men would start in and create districts and incur debts without having sufficient water supply in view.

Now, if this matter is referred to the Interior Department for investigation and approval, the question of water supply will be the first great question, or one of the first questions to be considered. The next question will be the amount of money necessary to bring that water to the lands to be irrigated. I think that is one of the most important features to be considered. They ought not to start in and form a district unless there is some assurance that there is going to be a sufficient supply of water to properly irrigate, and the expense should be a reasonable expense, so as not to place too high a burden on the land.

This bill provides that the Secretary of the Interior may, when requested, investigate the subject to ascertain what the conditions are and, if he approves the project, then he may enter into a contract to guarantee the interest on the bonds. That is one of the very important things to be considered. The question of financing these

great propositions is one of the serious questions with which we are confronted, not only in the West on our arid lands, but here in the East on large tracts of swamp and overflow lands. It takes a large amount of money to build dams to impound water, and to construct a distributing system and to build dikes and canals necessary to properly drain swamp and overflow lands. Individuals, as a rule, can not very well do it, because it requires too much capital. An irrigation or reclamation district should be properly officered and properly financed in order to succeed. The trouble is that men have gone in and taken charge of these matters who lacked sufficient funds to carry on the project and frequently have not had competent engineers. A great many of them have done it for speculative purposes, to get whatever they could out of it, and then go away and leave those who are in it stranded before the work was completed and without means to finish it.

It seems to me that if we are going to reclaim our arid and swamp and overflow lands some plan ought to be devised whereby the projects can be properly financed and properly officered and placed under a proper supervision, so that people will know that they are going to have a square deal when they start in.

Senator WORKS. Now, Governor, that is all right so far as it applies to Government lands on the public domain, but here we have in southern California, particularly in San Bernardino County, millions of acres of land, as good land as lies out of doors anywhere, if you can get water on it. Take the Victor Valley—I do not know whether you are acquainted with it or not——

Mr. GILLETT (interposing). Yes; I know what it is.

Senator WORKS. It is the finest kind of land and there is water in the mountains that is accessible for use in the valley. Application has been made to the Interior Department to establish a reclamation project to cover something like a half a million acres of that land. The answer to that is that there is no money in the Reclamation Service, that it would take 17 years of the revenues that would come into the service to complete the projects that have been already commenced.

Mr. GILLETT. That is true, I think.

Senator WORKS. And a very large proportion of the money that has been invested on those projects has been for the purpose of reclaiming privately owned lands. It has been shown here that some of these projects are serving nothing else but private lands.

Mr. GILLETT. I think, like the Orland district in California——

Senator WORKS (interposing). The Orland is one of them.

The ACTING CHAIRMAN. Which one is that?

Mr. GILLETT. The Orland project in the Sacramento Valley.

Senator WORKS. While that work is being done in the interest of private owners, some of them men in companies with millions of dollars with which to reclaim their own lands, the public domain that can be irrigated through the Reclamation Service is being neglected. I know that is true, especially in the case I mentioned.

Mr. GILLETT. Is that land Government land?

Senator WORKS. Yes, sir.

Mr. GILLETT. Then that can be done out of the reclamation fund. That is the purpose of the fund.

Senator WORKS. Now, you are a lawyer, and I will say that the thing that is troubling me in this matter is the power of the National Government to guarantee the payment of the interest on the bonds of a private or State corporation. That is the serious question with me. The first question is the power of the Federal Government to do that and the next question is the question of policy, whether our Government should embark on any such enterprise as that, especially in view of the fact that I have mentioned that there are millions of acres of public lands that can be reclaimed by the Government by the proper use of the money that could be devoted to that purpose.

Mr. GILLETT. Well, I have known right from the outset, Senator, that the constitutional question was one of the grave questions to be considered in this particular bill. I have not given the constitutional question much study. I have been busy and have not investigated it. That was one of the first questions that entered my mind in the consideration of this subject. Of course, under this bill, if it goes through, the Government will not be called upon to use any of the reclamation fund for the purpose of reclaiming any of the lands in these districts, that fund would still remain for the purposes for which it was created. That might be urged as a reason why private parties should irrigate or reclaim their own lands with their own capital; that is, that the fund that is provided for the irrigation of public lands shall only be used for that purpose.

Senator WORKS. You say it would not involve the use of any Government money. That would be so if the Government would not be called upon to make good its guarantee.

Mr. GILLETT. I am speaking of the reclamation fund money. Now, on this constitutional question I will say this: This is a very serious question. The United States Government in 1850, as we all know, gave to the States the swamp and overflow lands in the States for the purpose of reclamation, the intention being when that grant was made that something would be done by the States for the purpose of declaiming those lands and making them subject to cultivation. Well, a very small portion of these lands—I think there were some 77,000,000 or more transferred—has been reclaimed. The great majority of our overflow lands are to-day in practically the same condition that they were in when the act was passed in 1850. The Government which had control of all these lands and might have diked and reclaimed them and sold them, has parted with the title. That is true of a great deal of our arid lands in the West. People have taken them up under the homestead act, desert land act, and under the preemption act, the Government having in mind all the time the cultivation of these lands and using them for homes, but they have not been cultivated and have not been used for homes, and now the title is out of the Government. Now, the question arises, it being the policy of the Government to dispose of these lands for the purpose of settling them, can the Government, still following out that policy, assist the owners of the lands in any way to reclaim them in the doing of that work which the Government could have done if it had not parted with the lands and is it a good policy for the Government to do that? I suppose the Government would undoubtedly have the power to appropriate money to improve our *big rivers*, like the Sacramenta River in California and the big rivers *in the East where* there is a large amount of overflow lands, in aid

of navigation, by improving the channels. It does do that to-day. But here are great tracts of land that the Government did own but has now disposed of for practically nothing, always having in mind that those lands were to be cultivated and used by the people on which to build homes, to raise those products which the people of the country need.

Now, we find those who own the land can not do that without assistance. They are anxious to reclaim and cultivate the land and want to go ahead and do it. If they can do it then they will accomplish that which is of great importance to the State and Nation and do what the Government wanted them to do in the first place and what the Government could and would have done had it not given away and disposed of these very valuable lands.

Now, there are two sections of the Constitution that might be considered in this connection. One is the general welfare clause. That is broad in its meaning and broad in its terms. I know that when it has been construed by the courts in defining the power of the Federal Government, it has been quite liberally construed. It seemed to me that these 77,000,000 acres of land should be reclaimed and made productive, and when reclaimed they will be the best lands we have. They are capable of supporting a great population and adding greatly to the prosperity and wealth of the country, if properly developed. The same is true of the great arid regions of the West. We have millions of acres of land that is unprofitable and unproductive. Nobody lives on it but, with some assistance, all those lands might be brought into a state of productivity and result in adding to the taxable wealth and prosperity of the country. So that it might be that under the general welfare clause of the Constitution we have sufficient authority for this work. It seems to be sufficiently broad to cover it.

But we have another section of the Constitution, which, in my judgment, gives Congress the power and authority necessary—Congress, under that section, has power to dispose of and make rules and regulations respecting the property of the Government. It does not define or even attempt to limit in what way Congress shall dispose of the property of the Government, or for what purpose. That is left entirely to the discretion of Congress and its acts in that behalf can not be reviewed or annulled by any branch of the Government except through the veto power of the President. There are numerous instances in the past in which Congress has made donations of the Government's property and loaned its credit. If I remember correctly, the Government loaned a large sum of money to the city of New Orleans at the time it held an exposition to assist it in meeting its expenses and paying its debts. Also when St. Louis had its exposition I believe Congress passed a bill authorizing a loan of about $6,000,000 to that city, which was secured by the gate receipts. In many ways, Congress has made donations and extended its credit in the carrying out of projects of this kind, because it considered it was for the general welfare and for the public good.

Congress had the undoubted power to dispose of the property of the Government and for this reason can not only guarantee interest on bonds but can loan money direct. It seems to me that on the

same theory and for the same reason that the Government can establish banks or a system of rural credits that it can grant the aid provided for in this bill. The purpose of the rural credit is to loan money to farmers at low rates of interest. You do not loan to everybody, but only to a certain class of people. And why? To build up and develop the great agricultural interests of the country, and thereby add wealth to the Nation and increase its homes. Now, if the Government has the power to lend its money for purposes such as that, and no one doubts it, why has it not the power to lend it or to extend its credit to municipal corporations, because the reclamations districts are municipal corporations, having in mind the settlement, development, and improvement of large tracts of arid, swamp, and overflow lands? Of course, the security will be good, because the bonds can provide that the Government shall have a first lien on this land to take care of whatever interest the Government may advance.

It certainly would give credit and standing to these districts if they had the guarantee of the Government back of them. Under the jurisdiction of the Secretary of the Interior and his engineers, probably no enterprise of this kind would be started until it was carefully investigated, and therefore the securities would be readily sold and the people would have confidence in the scheme, which would add to the wealth of the Nation. The Government would not stand any chance of losing money on it; it would simply advance money to develop the property which in the first instance it would have developed itself if it had not parted with it, on the theory that it is for the general welfare of the country.

Senator WORKS. Well, Governor, that seems very plausible, but——

Mr. GILLETT (interposing). Well, I am just giving you my ideas. I am not stating it as an absolute proposition.

Senator WORKS. That is very plausible, but I think it is entirely fallacious, and for this reason: Suppose we take the conditions in California and apply your reasoning to one of our large Mexican ranches that we used to have in California, though we have not many of them left now. It would undoubtedly be to the public interest to have those ranches cut up into smaller tracts, irrigated, and developed for the public good and public welfare, but you do not think that the Government could loan money to a private corporation for the purpose of doing that development work on the theory that it would be in the public interest?

Mr. GILLETT. No; I do not say it could be done in that instance.

Senator WORKS. But I am trying to illustrate the extent to which your argument would necessarily carry you.

Mr. GILLETT. No. The point I am contending for is this: I am not giving it as my opinion at all that the bill is necessarily constitutional, because that is one of the great big questions we have to consider, but when I look back and see the donations that the Government has made in the past and the purposes for which it has disposed of the Government's property and study the power of Congress under the Constitution in such matters, I am firmly impressed with the belief that Congress has the power to dispose of the property of this Nation in whatsoever way it seems best in the public interest. The Constitution does not say how it shall dispose of the property of the Government or attempt to define for what purposes.

I think in this country of ours where conditions are constantly changing and new conditions are arising, that Congress must have the power and authority to meet the exigencies of the situation as they arise and perform the acts that are for the general welfare of the people as it appears at that time.

Senator WORKS. Now, are you including money in your designation of property?

Mr. GILLETT. Yes, sir.

Senator WORKS. You hold, I presume, that the Government can dispose of its money in any way that it thinks proper for the public interest?

Mr. GILLETT. Yes; if it is in the interest of the public welfare, Congress has that power, and it has not been limited unless it is limited by implication. There has never been any limitation in language. It has gone so far in the exercise of that power as to give away thousands and thousands of dollars of property and millions and millions of acres of land. Now, if it can exercise this power to the extent of giving away millions of acres of public domain, why can not it exercise that power to the extent of aiding those people to whom it has granted the public domain, in developing the property as the Government intended it should be developed when it gave it away, when the Government has fully protected itself in what it does, so as not to lose anything.

Now, there might be some objection the Government giving something away and not receiving anything from it, but where the Government only advances its credit for the purpose of carrying on what we all concede to be one of the greatest enterprises, one of the greatest public works of the country, and not suffer any loss, it seems to me that would not be an abuse on the part of Congress of the governmental powers. I would not expect the Government to go into any industrial matter, although, of course, we grant subsidies to the ships on the theory that we can use them in time of war and for the purpose of carrying the mails.

Senator CATRON. The trouble is that we have not got it up to that point. We have not been giving much subsidy to ships.

Mr. GILLETT. I am talking about the power to do it. A Government which meets the needs of the people has got to expand to meet the various conditions as they arise. Our Constitution is not a large one, but it has always been extended to meet the exigencies as they arise. When it was first thought that we did not have the authority to establish a national bank, I believe that was one of the first cases in which that question was raised, but they extended the Constitution and declared that we did have a right to do it. That question arose in the McCulloch case, in which Judge Marshall rendered his well-known opinion. They have always found some way of meeting these great questions when they arose.

Now, it might be that there are some districts in which the Government owns a certain portion of the land, and then you might put it on the ground that it is constitutional because it is a development of lands in which the Government is interested. I am just suggesting these thoughts as they come to me as grounds upon which it might be held that it was constitutional.

Senator WORKS. You have advanced the idea that the Government *should be helpful to* the people who are undertaking to develop th

arid lands, and I entirely sympathize with you in that view. I think one of the grave weaknesses of the Reclamation Service is that they are rendering absolutely no help to the individual settler on these arid lands. They build these large projects which cost a lot of money and they expect the settler to pay for it all, and frequently the settlers are not able to do it.

That, I think, was the principal reason for extending the law for the irrigation of private lands in connection with the public lands. If the Government, as a part of this scheme for the development of the public lands, had made some provision for helping the poor fellow who went upon these lands to get along for the first few years until he got a start we would have accomplished something under the Reclamation Service, but we have accomplished mighty little as it is.

Mr. GILLETT. But that is the great trouble. People have gone there with small means, undertaking a contract that they can not fulfill, and they have starved out there.

Senator WORKS. But a good many of them have been induced to go on these lands through false pretenses. Let me illustrate by what is called the Yuma project, in Arizona. The estimate of the cost to the settler was something like $40 or $45 an acre in the first place. The settlers took up these lands with the understanding that it was to cost $40 or $45 per acre according to the estimate made by the Government. The last time I heard about it the cost had run up to $107 an acre, which is more money than the land is worth.

Mr. GILLETT. Yes, sir; that is the trouble.

Senator WORKS. Now, that has been the trouble with a good many of these projects, and they are breaking down of their own weight. The result of it is that additional legislation has become necessary to take in private lands. I think that legislation came from that very trouble. Now, the courts have upheld the irrigation of private lands in connection with the public lands, which I think can be justified.

Mr. GILLETT. I do not think there is any doubt about the justification of that.

Senator WORKS. Because that is one means of enabling the Government to irrigate and dispose of its own lands.

Mr. GILLETT. Yes, sir.

Senator WORKS. But I have never been able to convince myself that the Government has any right to expend its money in building up these projects purely and solely for the purpose of irrigating private lands. I think it is a misuse of public money. It has been done without any direct authorization by Congress by the Reclamation Service. It has prevented the reclamation and irrigation of the public lands, for instance, in the case that I mentioned to you a while ago. There is no money to reclaim those public lands, because the money has been expended for the purpose of reclaiming and irrigating private lands often owned by private individuals in large tracts. I think, to be quite frank with you about it, that the Reclamation Service needs an overhauling, and it has got to come before very long.

Mr. GILLETT. I think that this question of reclaiming our arid lands and swamp and overflow lands is becoming such a grave question that it has got to be settled, and probably in the settling of it this overhauling may come.

Now, take the situation in the Sacramento Valley. There are thousands and thousands of acres in that valley under private ownership upon which very little is raised. They wait for a few drops of rain to take care of the crops. If it comes they raise a crop, but if it does not come they do not. There are millions of cubic feet of water that has been running down that valley from year to year which could be stored very well. They could put in the district an irrigation system to store a large amount of water and carry it by ditches and canals and make the country a very productive country, but that will never be done unless it is done as a whole and done undedr the direction of some competent engineer or some competent authority. It has been talked about for some time, but the people around there have not gotten anything together; they have not any hope of doing anything; they see the lands remaining idle for years and unproductive unless something is done to bring about a proper reclamation of that valley.

That is true in the San Joaquin Valley and the Willamette Valley; that is true in eastern Oregon and eastern Washington; that is true in Idaho and in all the West. There are great tracts of country of that kind that will be taken care of some day, but I think they will have to be taken care of by the Government, or at least the Government will have to take a hand in it.

Senator WORKS. I have been very much surprised that those projects have not been taken up by private capital. Under proper managemeint it ought to be a profitable investment.

Mr. GILLETT. They tried to reclaim a lot of land adjoining the Sacramento in California. A great many people went out there and bought up great tracts of land. The 6 per cent bonds were selling for 92 and 93, and finally they went down to 30 and 35, and everybody nearly collapsed. Of course, they got back to about 75 or 76 again; but if it had not been for the fact that those people had means to go ahead the whole thing would have fallen flat—not because the land is not rich, because it is the finest land in the world—but if they had not had the money or credit to do it they would have fallen through.

Senator JONES. Is not one great reason for so many of these failures, with reference to irrigation works, that the returns come in so slowly?

Mr. GILLETT. That is the trouble.

Senator JONES. Now, for instance, in the Yakima country we had a proposition known as the Sunnyside Canal. That was put in in 1892. I think it was opened up by a subsidiary company of the Northern Pacific Railroad. Every odd section belonged to the Northern Pacific. That was disposed of to this subsidiary company on the most reasonable terms that could be imagined, and they put in the canal and sold their water rights at $25 an acre, and they sold their land at $5 an acre. In other words, a man could get the land and the water right for $30 an acre. Well, there are about sixty or seventy thousand acres in that. There is a great deal of that land yet that has not been reclaimed and put under irrigation, even under the most favorable circumstances. Well, even though the land and the water rights were sold so low, the settlers could not pay even that, because a man who went there did not have anything, and

all he could do was to try to dig a living out of the land for a few years. The company went into the hands of a receiver and was afterwards reorganized, and finally the Government took it over as a part of the national development system.

I think that illustrates very clearly one of the fundamental reasons why private capital can not afford to go into these enterprises.

Mr. GILLETT. Well, they are afraid to go in.

Senator JONES. Well, the returns come in so slowly.

Mr. GILLETT. That is true.

Senator JONES. They want to get some returns for their money. They can not get if it the settlers can not get it out of the land over and above the cost of living there.

Mr. GILLETT. There are three classes of lands. First, the lands owned entirely by the Government which the Government would clearly have the right to reclaim.

Then, there is the second class of lands, those owned partly by the Government and partly by private parties. I think that kind of a proposition could be handled by the Government, because the Government would be working out its own lands.

Then, the third class comprises lands now in the ownership of private parties. That class is found in our overflow lands and in the lands which have been purchased from the States under homestead, desert, and preemption laws and by laying scrip on them.

Now, these lands have all got to be reclaimed some day, and it is very important to the West that they should be reclaimed as rapidly as possible, and they ought to be. Those who have made a success of it are those living upon the banks of streams where the water is easy to get, but when they live back from the streams, and have to go to the mountains for water, and have to build reservoirs and long canals to bring the water down before it can be used upon the land, then the question of great expense and engineering arises, and the problem becomes a difficult one. If a project can be properly financed, so that the people will know that it is safe to invest, and a man can go in there knowing that he will have a chance to get started and build a home, we will meet with success, otherwise we will have the same failures that we have had in the past.

Senator JONES. Capital does not care how long the principal is invested so that it gets its annual return.

Mr. GILLETT. Yes; the interest. It ought to be fixed so that the land will pay the interest and pay off the indebtedness. That should be done through cultivation of the lands. Whether this bill will do it or not, I do not know. There has got to be some legislation to do it or that land will never be reclaimed.

I believe Mr. Curry, of California, has introduced a bill of that kind in the House. That bill provides for the reclamation of the Sacramento and San Joaquin Valleys, the Government to bear one-third of the expense, the State one-third, and the property holders one-third.

Senator WORKS. To what extent, Governor, has the State of California gone in later legislation toward improving the credit of these irrigation bonds?

Mr. GILLETT. We have passed laws that savings banks can accept *them, and that has* helped out some.

Senator WORKS. Why should not the State of California guarantee the interest on these bonds rather than the National Government?

Mr. GILLETT. Well, I will tell you. We have a provision in our constitution, Senator, that the State can not loan its credit or make a gift to any corporation, municipality, or any individual. I think you will find that provision in every State constitution.

Senator WORKS. It is a pretty good provision.

Mr. GILLETT. Yes; it is a pretty good provision. I found it so when I was governor of California. It is a very good provision. That provision does not exist in the National Constitution. Our Constitution is very broad when it gives to Congress the right to handle and manage all the property of the Government. It seems to me it is a question for Congress to determine as to whether the country generally would be benefited, whether the people would be benefited, and whether it is good policy.

Senator CATRON. If you open that door, where would the thing end? Where would the limit be?

Mr. GILLETT. The limit would have to rest in the sound judgment of Congress in only extending it in instances where it was for the public welfare and general good.

Senator CATRON. Sometimes Congress might not have sound judgment.

Mr. GILLETT. Then if Congress should reach beyond that and do something that ought not to be done we have the courts to remedy it.

Senator JONES. Or Congress could repeal it.

Mr. GILLETT. Yes; Congress could repeal it.

Senator CATRON. But if it is unconstitutional——

Mr. GILLETT (interposing). If it is unconstitutional, then the courts can remedy it. If it is not unconstitutional, then it is in the power of Congress.

Senator CATRON. If you ask us to pass an act, you are going on the theory that it is constitutional?

Mr. GILLETT. Certainly; but if Congress has made a mistake, Congress can remedy it by repealing the act. But Congress has got to be depended on, as long as this Government and the present Constitution stands, to handle the property of this Government and dispose of it to provide for the general welfare and national defense. We are going to have continually new questions arising which have got to be met and decided, and Congress should not dodge a question because it is fearful that something will arise later on, or because they are doing something that a future Congress might think that they ought not to do.

Senator JONES. If you go on that assumption, we will never do anything.

Mr. GILLETT. Yes; that is right. On that theory we would never do anything. We have got to assume that Congress is going to act properly. Congress has got to take hold of the affairs of this great Nation with the powers that the Constitution has vested in it when big questions like this come up.

Senator WORKS. Governor, I wonder if you quite appreciate what the temptation to use the money of the National Government is at the present time, and to what extent Congress is going or proposes to go in improvements that ought to be made by the States.

Mr. GILLETT. I know it is going a long way.

Senator WORKS. That temptation is always with us. If you open the door as you propose, then, as the Senator from New Mexico suggests, there will be no end to this thing.

Mr. GILLETT. Oh, there will never be an end, as long as this Government stands, when people will come here and ask for legislation in which the Government will be asked to assist the public, and the Government is going to assist. It is only a question of whether or not the matter proposed is safe and fair, whether it is for the public benefit or the public good. Now, if all the arid lands in this country could be reclaimed without loss to the Government, and if all the millions and millions of acres of swamp and overflow lands in this country could be reclaimed and made profitable so that the people could settle and make their homes on them, why, Congress would have accomplished one great thing for this Nation.

Senator WORKS. Yes; but if we go on in the road we are now traveling as rapidly as we are going or proposing to go at the present time, it will not be very long before there will be absolutely no line of division between the States and the National Government. We will absolutely destroy the sovereignty of the States.

Mr. GILLETT. I will tell you, Senator. I am inclined to believe, whether we wish it or not—and I am a pretty good man in defending a State in its rights—that the time is fast approaching when this Nation is going to be a great central Government, with wonderful powers exercised in every part of it, and a State will not be much more than a precinct. I find that a great many of those who a few years ago were the strongest for State sovereignty are forgetting it altogether and are reaching out to give to this Government greater and greater power.

Senator WORKS. Yes; and they are selling the sovereignty of their States for money. Whenever there is an opportunity to get money out of the National Government to make improvements that the States should make, then they are perfectly willing to give up their sovereignty in that respect in order to get the money out of the Federal Treasury. That is the greatest danger.

Mr. GILLETT. Well, the drift is that way. It is growing all the time. The opinions that men had 40 or 50 years ago, opinions that men fought and died for, are now being forgotten by the new blood in this country and the new way of doing things.

I think we are going to have a great centralized Government, and the more power it gets the stronger and greater it will grow. We are drifting to it rapidly.

Senator WORKS. Whenever the people of this country reach that conclusion they ought, in fairness, to change the Constitution of the United States and make it a centralized Government, and not do it by violating the Constitution.

Mr. GILLETT. That is what they will do when they get that full and complete power. I see that Brazil a few days ago called a constitutional convention for the purpose of amending its constitution, because they say it is obselete and does not meet the present conditions, and their constitution is a copy of ours.

I am going to look up this constitutional question.

Senator WORKS. I do not think you will find very much in the way of a direct decision on the subject, Governor. I do not think there has ever been a proposition that has ever gone quite this far before.

Mr. GILLETT. No. I have not studied the question before, but I am going to study it, since this question has arisen.

Senator CATRON. I am inclined to think that if the bill was limited entirely to the public domain the Government might do something in the way of aiding irrigation on that public domain in order to dispose of the lands, because it has the authority under the clause of the Constitution to which you refer to make all rules and regulations in that regard. Under that clause the rules and regulations would enable the Government to dispose of the lands, but I do not see how you can go in and help private individuals. That very clause would probably limit the Government to the use of that power in regard to public lands and exclude all property except that of the United States.

Mr. GILLETT. Well, suppose part of the land was owned by private parties?

Senator CATRON. I do not think you can skip over and take in a part, because if you can take a part you can take it all. Under that theory you could exclude entirely Government property. I think it could be limited, and I am inclined to think the Constitution would authorize something of that kind. Whether the provisions in this bill would authorize it or not I do not know, because that would be guaranteeing to a private person. I think if they would enter into an agreement with the United States whereby after the water was on the lands the Government could sell the water or sell the land with the water at a given price, that would be constitutional, but I do not believe you could go to the extent of helping the outsider. They are doing it in this irrigation-project work to a great extent.

Referring to what Senator Works said a while ago, we have a worse proposition in New Mexico than he has in California, except that the cost will not run up so high. That is in the Elephant Butte project, where the provision is that 68,000 feet shall be given to the Republic of Mexico, and our people will bear the cost of it. That is to say, we are to build our dam for the benefit of Mexico. The Texas people do not have to do anything, though, of course, they will have to pay their part of the cost down there. But we will have to pay for the 68,000 acre-feet that will be given to Mexico. The Government will have to go ahead and make an appropriation of the water under our laws. They have appropriated all the water of the Rio Grande, and they are now going around advising the people not to take any water because it will interfere with the water in the Elephant Butte dam. About 99 per cent of the subsidiary streams are above that.

Mr. GILLETT. Is the Government doing any reclamation work in Texas?

Senator CATRON. Oh, no; not a particle.

Senator WORKS. I think they have one dam in Texas. That was stated yesterday. I think it was to irrigate only a part of the land.

Senator CATRON. They might do it on some fort or reservation.

Mr. RICE. You mean the El Paso project?

Senator CATRON. They are proposing to do that by irrigation from this project in New Mexico.

Mr. RICE. Oh, that is the land in Texas, is it not?

Senator CATRON. Yes; but those people who get the use of the water will have to pay their pro rata.

Mr. RICE. Everybody will have to do that. There is no reclamation project anywhere where they do not do it.

Senator CATRON. But Mexico does not do it and she gets 68,000 feet of it.

Mr. GILLETT. You mean that this Congress passed a law providing that 68,000 feet should be given to Mexico?

Senator CATRON. Oh, yes; that is under a treaty.

Senator WORKS. That was on the theory that the Mexican Government was entitled to a part of the waters of the Rio Grande because it is a boundary stream.

Senator CATRON. Of course, the money that is put into the Elephant Butte dam is money that arises from the sale of Government land which the Government has set apart for the purpose of improving the lands of the country where the sales were made.

The ACTING CHAIRMAN. Have you any more witnesses, Mr. Rice?

Mr. RICE. No, sir; there is no one else.

There is a statement by Mr. Ross that I would like to have incorporated in the record. He is representing the Union Pacific.

The ACTING CHAIRMAN. That will be incorporated. Also a letter from Hon. O. N. McArthur, a Representative from the State of Oregon.

(The statement of Mr. Ross referred to is here printed in full as follows:)

BY CHARLES P. ROSS, ENGINEER ON SPECIAL WORK, UNION PACIFIC RAILROAD, OMAHA, NEBR.

Gentlemen of the Committee on Irrigation and Reclamation of Arid Lands, at the request of the chairman of the Western States Reclamation Conference, the president of the Union Pacific Railroad requested me to attend the conference to be held in Washington the 25th day of March, and to represent the Union Pacific Railroad and the Oregon Short Line Railroad at that conference.

I was appointed by the governor of the State of Nebraska to represent the State at the International Irrigation Congress, which met in California October 13 to 21, 1915, and at that conference I was qualified to act as executive committeeman for the State of Nebraska, and in that capacity I represent the State of Nebraska here.

Of the two bills presented at that conference, one, S. 1922, introduced in the Senate of the United States, December 13, 1915, by Senator Jones, of Washington, entitled "An act relating to the reclamation of arid, semiarid, swamp, and overflow lands through district organizations and authorizing Government aid therefor"; and, second, H. R. 12365, introduced by Representative Smith of Idaho on February 26, 1915, entitled "A bill to promote the reclamation of arid lands"; it is my desire to contribute toward the support of these two measures.

I recognize that the members of the Senate Committee on Irrigation and Reclamation of Arid Lands are all from States in which successful agriculture is largely dependent upon irrigation, and that the Senators present no doubt are more familiar with the proposed measures and with the possible results which may be obtained if these become laws than I am.

I have listened attentively to the presentation that has been made here by different delegates of this conference and to the questions which have been asked them by the Senators. I do not think that I can add very much to what you gentlemen know of this subject, but I note that several of the Senators have *indicated that an enactment* similar to that of the Jones bill would be *unconstitutional. This* view point may or may not be competent, but is one which *is very conveniently* raised on a great many occasions.

With reference to a large number of the measures which relate to the redemption or disposition of the public domain, the control and conservation of the national resources, the same question has been raised. It is just as competent to say that the Reclamation Service, with its entire fabric which we all recognize as having accomplished a wonderfully useful work, can be classed as unconstitutional, yet the expenditure of one hundred million dollars toward the redemption of the arid public domain would not have been made without some provision of this kind. No doubt a large number of the measures that are advocated by the Senators here present meet the same objection.

I would say that many of the railroads of the western part of the United States, whose lines extend through the arid public domain are very much interested in the development of irrigation interests. Their desires are selfish ones in that they wish to make dividends on their investment, and are looking toward the development of the country as a whole to produce that end. The question of the redemption of the arid domain and reclamation of swamp and overflow land relates to a larger area and means better land with better returns from farming than is now found in the New England States, including New York and Pennsylvania.

The Union Pacific and the Oregon Short Line are trying to act jointly with the people, and are spending money in various ways to develop the land in their territory with this end in view.

I am satisfied that the objections raised regarding the constitutionality of the Jones bill will disappear with more careful thought by this committee.

While the Jones bill does not confirm to the laws of all of the States, I am satisfied that the measure is one that will assist in making the laws more uniform, and I am satisfied that it is one which the law of the State of Nebraska can be so modified as to conform with its requirements.

Under the laws of the State of Nebraska, districts are formed from lands that are contiguous which may be irrigated by one system of irrigation, and bonds may be issued which are virtually first mortgages on the land which can be directly benefited by irrigation. The districts are public rather than municipal corporations. The bonds run 20 years and bear 6 per cent semiannual interest. The first district irrigation law was passed in 1895. It was quite similar to the irrigation district law of California. The organization of the district provides for the election of officers. The assessment is made directly upon the lands which are benefited, and the county treasurer of the counties in which the irrigated land is located collects the taxes to pay the interest and the sinking fund as provided.

I am satisfied that if the Jones bill is enacted that our laws can be modified without great objection to enable the districts to avail themselves of its benefits.

The question was raised of the lands under the district being in the hands of private owners. Several of the canals of the Pathfinder project of the Reclamation Service extend into the State of Nebraska, both on the north side and on the south side of the North Platte River. A portion of the area of these canals on the north side of the North Platte River has not yet been completed. The Senators, on investigation, will find that the Department of the Interior advocates the method of handling these irrigated areas under the irrigation district laws of the States within the boundaries of the reclamation projects.

At the meeting of the 1915 Legislature of the State of Nebraska an enactment was passed conforming to this method which met with the approval of the Department of the Interior.

The object to be obtained by the guaranty of the payment of the interest is to enable the bonds to be sold at something near par value. Two of the irrigation districts organized in the State of Nebraska which came directly under my knowledge as an engineer, viz, the farmers' irrigation district in Lincoln County and the alfalfa irrigation district in Keith County, have fortunately been able to weather the period that attends the building of all of these enterprises in which the farmer is making his improvements and subduing the soil, extending over a period of three or four years, in which the returns from the land do not pay the necessary expenses incurred. The alfalfa irrigation district failed to sell the bonds which were voted to build its canals and structures. The bonds were advertised and were finally sold to those connected with the enterprise and to a contractor. The equivalent cash value received for the bonds was about 75 cents on the dollar.

Under the irrigation laws of the State of Nebraska we are allowed to condemn irrigation works already in operation and to proceed with the management of the areas as provided by the law.

We hope that the Senators will find this measure one which can be enacted. Without some provision of this kind it is found impossible to sell bonds on enterprises where the issue amounts to a mortgage of less than $20 per acre on land where the returns warrant values of $150 to $200 per acre.

(The letter of Representative McArthur above referred to is here printed in full, as follows:)

HOUSE OF REPRESENTATIVES,
Washington, D. C., March 28, 1916.

Hon. MARCUS A. SMITH,
Chairman Committee on Irrigation and Reclamation of Arid Lands,
United States Senate.

MY DEAR SENATOR: I wish to advise that I am strongly in favor of the principles contained in Senate bill 1922, which is now under discussion before your committee.

This bill, if enacted into law, will make the reclamation of large projects possible in the western arid-land States and the southern and middle western swamp or overflow land States which can not now be reclaimed by the United States Reclamation Service on account of the lack of funds. In addition, the requirements of the Secretary of the Interior under this bill would have the effect of securing uniform irrigation and drainage district laws throughout the Nation, and would in this manner stabilize the securities offered by these municipalities. In addition, the selling price of the bonds would be at par or at a premium in addition to offering a lower interest rate to the residents and all prospective entrymen of Government land contained in these districts. The guaranty by the Government of the interest on the bonds, especially during the construction and early development period, would tide the farmers on these arid or overflow lands over the period when they most need assistance, after which they would be self-sustaining and the bonds amply secured by the improved lands.

The Government would be secured by the district laws in force in the various States, which are backed by the taxing power of the States in the same manner as a school district or other public-improvement district.

This legislation is along the same lines as farm-land loans and other rural assistance offered, as rural credits, and should be classed as such.

Very respectfully,

C. N. MCARTHUR.

The ACTING CHAIRMAN. If no one else desires to be heard, the committee will now adjourn.

(Thereupon, at 12.15 o'clock, the committee adjourned to meet at the call of the chairman.)

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